Supreme Court, U.S.
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No. (1)

In The
Supreme Court of the United States

THOMAS E. KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Vice-Chairman of the Oklahoma Tax Commission; and CONSTANCE IRBY, Secretary-Member of the Oklahoma Tax Commission,

Petitioners,

v.

OSAGE NATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, an Indian tribe is seeking a declaratory judgment in a federal court holding that a state's largest county is and has remained—for more than a century—an Indian reservation, and it is seeking an injunction that would enjoin state tax officials from making contrary findings in administrative tax refund cases pursued by tribal members (non-parties to the litigation) even though the state has long exercised jurisdiction and sovereignty over tribal taxpayers who reside in the county, but not on Indian lands. The questions presented are:

1. May federal courts employ the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to permit suits by Indian tribes, otherwise barred by state sovereign immunity, that seek to establish sovereignty and jurisdiction over historical reservations, without taking into consideration the substantial impact of the relief on the sovereignty and jurisdiction long-exercised over such lands by states?

2. In view of this Court's ruling in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), and other decisions, may a federal court allow an Indian tribe's suit—otherwise barred by the Eleventh Amendment—to proceed against state officers under the so-called "straightforward inquiry" used to determine the application of the *Ex parte Young* exception, when the relief would divest a state of substantial and long-exercised civil and criminal jurisdiction over its largest county?

3. Does a suit by an Indian tribe seeking a judicial determination that its historical reservation "remains" a present-day reservation involve the type of retrospective relief that cannot be pursued against state officers under the *Ex parte Young* exception to state sovereign immunity?

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following:

Petitioners are officers of the State of Oklahoma who constitute the members of the Oklahoma Tax Commission, a state governmental agency. The petitioners have no corporate parents, and no publicly held companies or corporate subsidiaries are involved in this case.

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OPINIONS BELOW

The court of appeals decided this case in an unpublished order and judgment, which is reproduced as Appendix A. (Pet. App., *infra*, 1a-19a.) The order of the district court denying the petitioners' motion for dismissal is also unreported, but is reproduced as Appendix B. (Pet. App., *infra*, 20a-23a.)

JURISDICTION

The court of appeals entered its judgment on December 26, 2007. A timely filed petition for rehearing and rehearing en banc was denied on February 26, 2008. (Pet. App. C, 24a-25a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment of the Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

STATEMENT OF THE CASE

Upon Oklahoma's entry into the Union in 1907, the Osage Nation Indian reservation was incorporated into the new state as its largest county by area, Osage County. In 2001, after almost a century of the exercise

of state sovereignty and jurisdiction over the county, the tribe initiated this action in a federal court to judicially establish that the entire county is an Indian reservation. While the tribe's suit nominally seeks to enjoin Oklahoma's collection of state income taxes from tribal members who live in Osage County, the tribe necessarily must establish that the entire county is a present-day Indian reservation in order to demonstrate that ongoing state taxation is improper. The primary relief the tribe is seeking would thus effectively roll back a century of state jurisdiction across an entire county, and it would therefore have, as the Tenth Circuit acknowledged, "far-reaching implications on Oklahoma's sovereignty."

Although recognizing that the tribe's suit is one essentially *against the state* and thus barred by Oklahoma's immunity from suit guaranteed under the Eleventh Amendment, the court of appeals nevertheless permitted the action to proceed against the individual tax commissioners under the doctrine of *Ex parte Young*, a legal fiction intended to be applied in an appropriate case to ensure the supremacy of federal law. Yet as a judicially crafted doctrine permitting the exercise of federal jurisdiction notwithstanding the states' constitutionally recognized immunity, the *Young* fiction must have—and does have—limits. As this Court recognized in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the *Young* doctrine cannot be applied in cases—such as this one—in which Indian tribes seek to divest states of sovereignty and jurisdiction over lands within their boundaries, and to enjoin them from enforcing their own laws.

The Tenth Circuit, however, interpreted this Court's recent jurisprudence as placing virtually no meaningful limits on the application of *Young*—even in important sovereignty disputes—other than that the relief sought must be *prospective* and not *retrospective* in nature. Not only is that approach contrary to the result in *Coeur d'Alene*, but it means that the *Young* doctrine can be applied not only for its core purpose—to ensure the enforcement of federal law—but for almost any purpose, including subjecting the core sovereignty and jurisdiction of states to review in federal courts. Under such an approach "the Eleventh Amendment, and not *Ex parte Young*, [will] become the legal fiction." *Verizon Md. Inc.* v. *Public Service Comm'n of Md.*, 535 U.S. 635, 649 (2002) (Kennedy, J., concurring). This case thus presents an important federal question, and one that has caused uncertainty in the federal circuits and district courts—namely, whether the *Ex parte Young* exception may properly be applied in litigation seeking relief that challenges core state sovereignty interests.

Factual Background

Until the last years of the 19th century, virtually all of the lands that make up the State of Oklahoma were Indian lands. In the 1890s, Congress began forcing the allotment of those lands in severalty.[1] By

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[1] In 1890, Congress, in preparation for statehood, created the Oklahoma Territory in the western half of the present-day state, and most of the tribal lands there were allotted before the turn of the century pursuant to the General Allotment Act, or the "Dawes Act." *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW

1901, only the Five Tribes' lands, two small reservations, and the Osage Reservation remained unallotted within the boundaries of the future state.[2]

The Osage Nation had, in 1871—due to pressure from the United States government and harassment on its Kansas reservation from settlers, squatters, and other tribes—purchased a nearly 1.5 million acre reserve in present-day north central Oklahoma.[3] In the early years of the statehood movement for Oklahoma, the Osages were exempted from the provisions of the General Allotment Act and other federal initiatives to force allotment.[4] Even so, by the turn of the century the Osages were a minority on

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§ 4.07[1][a], at 296 (2005 ed.) [hereinafter FEDERAL INDIAN LAW]; *see also* General Allotment Act, 24 Stat. 388 (1887); Oklahoma Organic Act, 26 Stat. 81 (1890). At the same time, Congress began forcing the allotment of tribal holdings in eastern Oklahoma—long known as "Indian Territory"—through a series of legislative enactments and through the Dawes Commission, created in 1893 to negotiate the allotment of the Five Tribes' lands. *See* FEDERAL INDIAN LAW § 4.07[1][a], at 296-97.

[2] *See, e.g.*, Jeffrey Burton, INDIAN TERRITORY & THE UNITED STATES, 1866-1906, at 244 (Univ. Okla. 1995).

[3] *See, e.g.*, III GALE ENCYCLOPEDIA OF NATIVE AM. TRIBES at 318-19 (Gale Research, Inc. 1998) [hereinafter GALE ENCYCLOPEDIA]; W. David Baird, THE OSAGE PEOPLE at 55-58 (1972); Terry P. Wilson, THE UNDERGROUND RESERVATION: OSAGE OIL at 14-19 (Univ. Neb. 1985) [hereinafter UNDERGROUND RESERVATION].

[4] *See, e.g.*, III GALE ENCYCLOPEDIA at 319; THE OSAGE PEOPLE at 57-58; *see also* General Allotment Act, ch. 119, § 8, 24 Stat. 388 (1887).

their own reservation, and there was increasing pressure not only from outside but from within the tribe to accept allotment of the tribal estate.[5] For some 15 years, the Osages debated the allotment question.[6] Eventually Congress passed the Act of June 28, 1906, ch. 3572, 34 Stat. 539—known as the "Osage Allotment Act"—under which the entire surface of the reservation was allotted in severalty to the members of the tribe.

At statehood in 1907, the Osage Reservation was incorporated into Oklahoma—with the approximate boundaries of the historic reservation marking Osage County—and the state began exercising jurisdiction over all of the county, with the exception of the tribal

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[5] *See, e.g.*, Berlin B. Chapman, *Dissolution of the Osage Reservation* (pt. 1), XX CHRONICLES OF OKLA. 244, 244 (Sept. 1942) [hereinafter *Dissolution*]; *Dissolution* (pt. 2), XX CHRONICLES OF OKLA. 375, 375-76 (Dec. 1942); III GALE ENCYCLOPEDIA at 319; OSAGE PEOPLE at 67-71; John Joseph Mathews, THE OSAGES: CHILDREN OF THE MIDDLE WATERS 772-73 (Univ. Okla. 3d ed. 1982); UNDERGROUND RESERVATION at 47.

[6] Support for dissolution of the reservation grew gradually within the tribe, and in June 1904 a pro-allotment principal chief and council were elected. Shortly thereafter the Osage Nation began negotiating allotment legislation with the Department of Interior and Congress. An initial version of the act was drafted and approved by the tribe itself, and the resulting legislation dissolving the reservation had strong support among the Osages. *See* H.R. Conf. Rep. No. 59-4996, at 4 (1906) (noting "tribe was almost unanimous for the measure"); H.R. Rep. 59-3219, at 1-2 (1906) (noting "all factions" of the tribe approved allotment legislation); *see also* OSAGE PEOPLE at 70; *Dissolution* (pt. 2) at 377.

and individual Indian trust lands.[7] (Pet. App. at 4a.) Covering some 2,250 square miles, Osage County is larger in area than each of the states of Delaware and Rhode Island. (Pet. App. at 3a.) Today Indian lands comprise only a small fraction of the land within Osage County.

In 1999, a member of the Osage Nation who was employed by the tribe and who lived in Osage County (although not on Indian land) protested the state's assessment to her of income tax. (Pet. App. at 5a.) The Oklahoma Tax Commission denied the tribal member's requested exemption on the ground that she did not live within "Indian country" for purposes of 18 U.S.C. § 1151. (Pet. App. at 5a.) The tribal member did not appeal the administrative determination to a state court, as required under Oklahoma law. Instead, the tribe subsequently brought this action on its own behalf.[8]

District Court's Decision

The Osage Nation filed this litigation in the United States District Court for the Northern District of Oklahoma in 2001 seeking declaratory and injunctive relief legally re-establishing its historic reservation and prohibiting state taxation of tribal members

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[7] *See* UNDERGROUND RESERVATION at 97; *see also* Oklahoma Enabling Act, 34 Stat. 267 (1906).

[8] No individual tribal members are parties to this action.

within Osage County.[9] Initially, the Tribe named as the party defendants the State of Oklahoma and the Oklahoma Tax Commission. (Pet. App. at 5a & n.3.) Subsequently, the tribe amended the suit to add the three members of the Commission, the governing body of the state taxation agency. At the outset of the litigation, the state parties moved to dismiss the tribe's claims as barred in their entirety by the state's sovereign immunity.

In deciding the motion to dismiss, the trial court concluded that Indian tribes are permitted under 28 U.S.C. § 1362 to seek injunctive relief from state taxation in federal courts, and therefore ruled that

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[9] The tribe requested that the trial court enter a judgment:

> "(a) Pursuant to 28 U.S.C. § 2201, enter a declaratory judgment holding:
>
> (1) that the Nation's reservation is and remains Indian country of the Nation; and
>
> (2) that the Nation's members who earn income and reside within the geographical boundaries of the Nation's reservation are not subject to or required to pay taxes to the State and the Commission on the income earned by the Nation's members from their employment in the Indian country of the Nation.
>
> (b) Ordering a permanent injunction restraining and prohibiting Defendants, and all their employees, agents and those acting in concert or participation with them from levying or collecting Oklahoma state income taxes upon the income of the Nation's members who are employed, earn income and reside within the geographical boundaries of the Nation's reservation;
>
> . . . ."

(Am. Complaint at 5 (filed Sept. 10, 2001).)

neither the Eleventh Amendment nor the Tax Injunction Act, 28 U.S.C. § 1341, bar suits by tribes seeking injunctive relief from state taxation. (Pet. App. at 22a-23a.)

DECISION OF THE COURT OF APPEALS

On December 26, 2007, a panel of the Tenth Circuit entered an unpublished order reversing in part and affirming in part the trial court's decision. Addressing the trial court's primary holdings, the Tenth Circuit noted that 28 U.S.C. § 1362 is a general jurisdictional statute that does not, under this Court's decision in *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775 (1991), provide for a congressional abrogation of state sovereign immunity. (Pet. App. at 9a-13a.) Tribal challenges to state taxation have been permitted to proceed under § 1362, the appeals court explained, because they involved only claims against officials seeking injunctive relief from state taxation. (Pet. App. at 11a.) But the court recognized that "the essence of this case is whether the Nation or the State of Oklahoma is the supreme sovereign with respect to Osage County or whether some form of dual sovereignty may apply." (Pet. App. at 11a.) The court of appeals thus concluded that the Osage Nation's "suit is not a mere tax injunction suit," and that it could proceed in federal court only if it fell within an exception to the bar of state sovereign immunity. (Pet. App. at 12a-13a.)

Noting that no party contends Oklahoma has waived its immunity for this case, or that Congress has abrogated the state's immunity in this context, the court of appeals held that the trial court had erred in

ruling the case could proceed against the State of Oklahoma and the Commission. (Pet. App. at 13a.) The Tenth Circuit, however, held that the claims against the individual Commissioners could proceed under the doctrine of *Ex parte Young*.

The Tenth Circuit acknowledged the decision in *Coeur d'Alene*, but decided that as a decision representing a limitation on the application of *Young* in sovereignty disputes it is no longer controlling. Following this Court's decision in *Verizon Maryland Inc.* v. *Public Service Commission of Maryland, supra*, the court of appeals concluded, the test for the application of the *Young* exception simply turns solely on whether certain pleading requirements are satisfied and whether the relief alleged is prospective in nature. (Pet. App. at 18a.)

At the time this case was briefed and argued, the Tenth Circuit's leading decision in the area, *ANR Pipeline Co.* v. *Lafaver*, 150 F.3d 1178 (10th Cir. 1998), required a consideration of whether the relief sought "implicates special sovereignty interests" of the state before an application of the *Young* exception. *Id.* at 1190. Shortly before this case was decided the Tenth Circuit had, in *Hill* v. *Kemp*, 478 F.3d 1236 (10th Cir. 2007), eliminated such a consideration in favor of what it understood as the "straightforward inquiry" set forth in *Verizon Maryland*. The circuit thus explained its understanding that in applying *Young* "'a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" (Pet. App. at 16a (quoting *Verizon Maryland*, 535 U.S. at 645).)

In a departure from its earlier analysis, the appeals court read *Coeur d'Alene* as having a narrow application to cases involving the "equivalent to a quiet title action." (Pet. App. at 14a-15a.) Distinguishing *Coeur d'Alene* on the basis of this analysis, the appeals court reasoned that the relief sought in this case "does not involve an actual title dispute" since "[s]overeignty is the issue here, not ownership of land." (Pet. App. at 18a.)

Yet the Tenth Circuit also acknowledged that uncertainty exists over the continuing meaning of the *Coeur d'Alene* decision, in part in view of the apparent conflict between the principal and concurring opinions in *Coeur d'Alene*, and in part because of this Court's statement of the "straightforward inquiry" for the application of *Young* in *Verizon Maryland*. (Pet. App. at 15a-16a.) In general, the Tenth Circuit concluded that "[i]t is not clear what is left of *Coeur d'Alene* following *Verizon Maryland*." (Pet. App. at 17a.) Nevertheless, in view of its understanding that *Verizon Maryland* clarified the *Young* analysis the court explained that "[w]e may consider only whether the relief sought by the Nation is prospective in caption and substance, and we conclude it is," and that while "[t]he relief sought may have far-reaching implications on Oklahoma's sovereignty, . . . it nonetheless falls within the *Young* exception to Eleventh Amendment immunity . . . ." (Pet. App. at 18a-19a.)

REASONS FOR GRANTING THE PETITION

As the Tenth Circuit accurately observed, this case—far from being a mere tax case—"'calls to mind

the sort of literal land grab effort'" made by an Indian tribe in *Coeur d'Alene*, and thereby places at risk before a federal court substantial sovereignty interests and jurisdiction of the State of Oklahoma. (Pet. App. at 19a.) Indeed, if the historical Osage Reservation were to be judicially recognized as a present-day Indian reservation, more than a century of the exercise of state sovereignty and civil and criminal jurisdiction—in areas from environmental jurisdiction to traffic regulation, and from land use planning to taxation—would be subject to being rolled back in favor of tribal jurisdiction. At stake in this case is, as the court of appeals accurately observed, the future of the state's jurisdiction over approximately a county consisting of approximately 2,250 square miles. (Pet. App. at 3a.)

Not only is this case of extreme importance to the State of Oklahoma, but it also involves an important question in Eleventh Amendment jurisprudence—namely, whether the *Ex parte Young* exception may be applied to permit federal jurisdiction over cases involving substantial challenges to state sovereignty and jurisdiction. As the Tenth Circuit's decision illustrates, uncertainty exists over not merely the meaning of the *Coeur d'Alene* decision but also how state sovereignty interests are to be treated in the *Young* analysis. This case thus demonstrates the need for this Court to address and clarify the application of the *Young* exception to cases involving efforts to divest states of substantial sovereignty and jurisdiction.

Since *Coeur d'Alene*, this Court has not revisited the application of the *Young* doctrine in a case involving a similar effort by a plaintiff to divest a state

of core sovereignty interests, particularly those involving sovereignty over large land areas. As a result of the uncertainty that has arisen, an uneven application of *Young* has developed among the courts of appeals. Several circuits, including, now, the Tenth Circuit, no longer consider the sovereignty interests at issue in a case such as this one before applying *Young*. Other circuits continue to acknowledge such a consideration, if only by applying *Coeur d'Alene* under their interpretation of its factual holding. Neither of these approaches, though, adequately addresses cases of this type in a clear and coherent manner. The first approach does a disservice to the states' constitutionally guaranteed immunity. The latter purports to limit *Coeur d'Alene* to a vague class of cases involving the "functional equivalent of a quiet title action," but it yields no meaningful guidance to the federal district courts concerning when state interests prevent an application of *Young*.

This case and others like it present circumstances far from those to which the doctrine of *Ex parte Young* was intended to apply—cases in which federal courts are asked to enjoin state officials from engaging in ongoing violations of federal law. In this case, the tribe's ability to demonstrate an "ongoing" violation of law depends entirely on the ultimate outcome of its sovereignty claim. There is no ongoing violation of federal law unless the tribe can establish that the over 100 years of federal and state interpretation of the legal status quo were in error. In short, under no reasonable interpretation of the complaint is there an allegation that the state officers in this case are violating any plainly stated mandate of federal law,

and therefore the implications on the supremacy of federal law are, at best, minimal.

On its face, this case involves a request for a clarification—or perhaps a re-interpretation—of federal laws (in particular Oklahoma's statehood acts) adopted more than a century ago. If the relief requested—indistinguishable in any meaningful way from that sought in *Coeur d'Alene*—is permitted under the *Young* doctrine it is difficult to conceive of any relief impacting a state's sovereignty and jurisdiction that would prevent the application of *Young*. If *Young* has no limits, at least with respect to efforts to divest a state of substantial sovereignty, then the value of sovereign immunity, as recognized under the Eleventh Amendment, becomes meaningless.

I. THE TENTH CIRCUIT'S FAILURE TO TAKE STATE SOVEREIGNTY AND JURISDICTION INTO CONSIDERATION IN ITS APPLICATION OF THE *YOUNG* DOCTRINE ADDS TO THE CONFLICT AND UNCERTAINTY AMONG THE CIRCUITS ON AN IMPORTANT FEDERAL QUESTION

Since *Coeur d'Alene*, the decisions of the courts of appeals increasingly have reflected unevenness in the application of the *Ex parte Young* doctrine to cases—such as this case—that represent substantial challenges to state sovereignty. Almost every circuit to address this issue has expressed uncertainty about the application of *Coeur d'Alene*, and as a result non-uniform analyses have emerged in this context. Under the interpretation and application of the so-called "straightforward inquiry" prevailing in the

courts of appeals, no consideration is given to the impact of the relief alleged on a state's sovereignty or other important interests. Under another approach, courts have continued to acknowledge the ultimate holding in the *Coeur d'Alene* case, although they have attempted to limit its potential application to their understanding of the facts in that case. Neither of these approaches provides satisfactory guidance on an important question of federal law.

A. The Courts of Appeals Have Struggled to Find Clear Guidance in *Coeur d'Alene*, Particularly in Light of Subsequent Decisions Applying *Young*

Long ago this Court interpreted the Eleventh Amendment as protecting the states from private suits based upon federal law. *See Hans* v. *Louisiana*, 134 U.S. 1, 14 (1890). This constitutional privilege has been applied to suits against states by certain sovereigns, including, as is relevant here, Indian tribes. *See Blatchford*, 501 U.S. at 782. Far from a mere rule of the federal common law, state sovereign immunity has been established as an important attribute of sovereignty that the states retained in entering the Union, and that is part of the very structure of our federal system. *See Alden* v. *Maine*, 527 U.S. 704, 712-54 (1999). Accordingly, recent decisions of this Court have made plain that Congress's and the federal courts' powers to abrogate state immunity from suit are limited. *See, e.g.*, *Alden*, 527 U.S. 748-54; *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 72-73 (1996).

Of course the states have, as part of the constitutional plan, provided "an important assurance that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.'" *Alden*, 527 U.S. at 755 (quoting U.S. Const. art. VI). In other words, the constitutional privilege of a state to assert its sovereign immunity does not permit state officials to disregard federal laws, and it does not bar all judicial review of state officials' compliance with federal law. *See id.* But that overriding principle is not in dispute in this case, which focuses, rather, on the limits of the federal courts' power to adjudicate suits against the states involving core state sovereignty and jurisdiction.

It is well-established that *Ex parte Young* represents a so-called legal fiction—necessary to ensure the supremacy of federal law—that a suit against a state official to enjoin an ongoing violation of federal law is not barred by the states' constitutionally guaranteed immunity. *See Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984). But such a judicial doctrine must have limits or it could overtake the underlying constitutional principle. Over time this Court has recognized such limits on the application of the *Young* doctrine, including that it does not extend to suits seeking "retroactive" relief. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974). As a result, this Court's decisions have established that suits seeking prospective injunctive relief from a state official's violation of federal law generally are not barred by state sovereign immunity. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 73; *Green* v. *Monsour*, 474 U.S. 64, 68 (1985).

Similarly, the *Coeur d'Alene* decision represented an unremarkable recognition that the broad limitation represented by the *prospective-retrospective* distinction does not adequately respect states' constitutional immunity in every instance. *See Coeur d'Alene*, 521 U.S. at 270 (Kennedy, J., opinion of the court) (noting "[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction"). Such cases include those that seek effectively to alter the sovereignty and jurisdiction of a state. Such suits, moreover, are far from those within the core purpose of the *Young* doctrine—to stop plainly *ultra vires* acts of state officials with respect to federal law.

In *Coeur d'Alene*, an Indian tribe sought to establish beneficial ownership, control, and jurisdiction over submerged lands and a lakebed. The tribe in *Coeur d'Alene* was seeking to establish that its ownership in—and therefore its sovereignty over—such lands had never been extinguished, 521 U.S. at 264-65, and the Osage Nation makes a very similar claim that its sovereignty and jurisdiction over Osage County has never been extinguished. In *Coeur d'Alene*, this Court held that the tribe's claim was barred by state sovereign immunity, and further that the action could not proceed as a claim against state officers under *Young*. *Id.* at 269, 287-88. That the Tenth Circuit reached a different result in this case on facts closely similar to those in *Coeur d'Alene* demonstrates the confusion or uncertainty about the appropriate application of *Young* in this context.

The precise meaning of *Coeur d'Alene* has been much debated, largely because, as the Tenth Circuit explained, it "involved multiple and fractured opinions."[10] 478 F.3d at 1257. For example, the Tenth Circuit initially interpreted the concurring opinion in *Coeur d'Alene* as "provid[ing] the controlling guidance for lower courts and sought to apply that approach, as best we understood it." *Hill*, 478 F.3d at 1258. Virtually every circuit to address *Coeur d'Alene* has observed similar uncertainty about its meaning and about how it described a limitation on the application of *Ex parte Young*.[11]

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[10] The Tenth Circuit's reading of the decision illustrates the source of much of the uncertainty. As the court of appeals has notes, the opinion of the court in *Coeur d'Alene* did not command a majority on certain issues, including "the key question [of] how lower courts should change their analyses under *Ex parte Young*." 478 F.3d at 1257. On that point, Justice Kennedy, joined only by Chief Justice Rehnquist, proposed "a 'case-by-case' approach in which lower courts should 'reflect a sensitivity' to a 'broad' range of questions ranging from the nature and significance of the federal rights at stake, the state interests implicated by the lawsuit, and the availability of a state forum.'" *Id.* (quoting *Coeur d'Alene*, 521 U.S. at 280, 117 S. Ct. at 2028 (Kennedy, J., opinion of the Court). Justice O'Connor, joined by Justices Scalia and Thomas, authored a separate opinion rejecting the concept of a balancing approach, but joined in the holding that the suit should be dismissed. 521 U.S. at 288. As a result, the courts of appeals have attempted to derive guidance from the ultimate holding, if not from the rationale in the decision that failed to command a majority.

[11] *See, e.g.*, *Western Mohegan Tribe & Nation* v. *Orange County*, 395 F.3d 18, 21-23 (2d Cir. 2004); *Dakota, Minn. & E. R.R.* v. *South Dakota*, 362 F.3d 512, 516-18 (8th Cir. 2004); *Agua Caliente Band of Cahuilla Indians* v. *Hardin*, 223 F.3d 1041,

This uncertainty notwithstanding, many federal courts viewed *Coeur d'Alene* as announcing a new limitation on the *Young* doctrine. The Tenth Circuit's leading post-*Coeur d'Alene* precedent, *ANR Pipeline Co.* v. *Lafaver*, specifically required a consideration of the impact of the relief sought on a state's sovereignty interests. In *ANR Pipeline*, the court of appeals explained that

> "'federal courts must examine whether the relief being sought against a state official "implicates special sovereignty interests." If so, we must then determine whether the requested relief is the "functional equivalent" to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment,' such as a retrospective money judgment."

Hill, 478 F.3d at 1258 (quoting *ANR Pipeline*, 150 F.3d at 1190). This approach prevailed until the Court's decision in *Verizon Maryland*.

In *Verizon Maryland*, the Court addressed the sovereign immunity defense asserted by state officers faced with litigation brought under a federal telecommunications act. Reversing the Fourth Circuit's decision not to apply *Young*, the Court explained that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an

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1045-48 (9th Cir. 2000); *Earles* v. *State Bd. of Certified Pub. Accountants*, 139 F.3d 1033, 1039-40 (5th Cir. 1998).

ongoing violation of federal law, and seeks relief properly characterized as prospective." 535 U.S. at 645 (quoting *Coeur d'Alene*, 521 U.S. at 296).) This statement of the *Young* test prompted a reassessment by the Tenth Circuit and other courts of appeals of the analyses they had implemented after *Coeur d'Alene*. But after this reassessment uncertainty remains, since the *Verizon Maryland* decision involved issues different than those in *Coeur d'Alene*, and since it left unclear how sovereignty disputes such as this case are to be analyzed under *Young*.

This is due in part because the *Verizon Maryland* decision did not address relief that sought to divest a state of sovereignty and jurisdiction over part of its land base. Rather, the Eleventh Amendment defense in *Verizon Maryland* was based on the holding in *Seminole Tribe*, which involved a federal statute that contained a specific remedial scheme evidencing an intent to foreclose federal court jurisdiction over disputes. *See Verizon Md.*, 535 U.S. at 645-47. Despite this, the *Verizon Maryland* decision has been viewed as a shift in this Court's application of the *Young* exception away from any consideration of the sovereignty interests implicated in a particular suit.

B. Uneven Approaches Have Emerged to Applying the *Young* Analysis in Cases Involving Sovereignty Disputes

Since *Verizon Maryland*, the courts of appeals have struggled to try to reconcile the result in *Coeur d'Alene* with the Court's most recent statement of the "straightforward" analysis for the application of *Young*. In some circuits litigation seeking to divest a

state of substantial sovereignty and jurisdiction will be permitted to proceed in federal court, while in others the courts of a state will appropriately have the first opportunity to determine the matter. Not only do these different approaches appear to be yielding different results, but the states' constitutionally recognized immunity from suits deserves a uniform application of *Young*.

The Tenth Circuit changed course concerning the application of the *Young* doctrine to sovereignty disputes in its decision in *Hill* v. *Kemp*, issued shortly before this case was decided. In *Hill*, the court explained that

> "[t]he Supreme Court's formulation of *Coeur d'Alene* in *Verizon Maryland* is . . . somewhat different from what we had understood it to be in *ANR Pipeline*. In rejecting the Fourth Circuit's analysis, the Supreme Court in *Verizon Maryland* clarified that the courts of appeals need not (and should not) linger over the question whether 'special' or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought. Thus, to the extent that our decision in *ANR Pipeline* read *Coeur d'Alene* as requiring 'federal courts [to] examine whether the relief sought against a state official "implicates special sovereignty interests",' we recognize today that *Verizon Maryland* abrogated this step."

Hill, 478 F.3d at 1259 (quoting *ANR Pipeline*, 150 F.3d at 1190, and *Verizon Md.*, 535 U.S. at 645) (citation omitted). The Tenth Circuit thus adopted the so-called

"straightforward" analysis for the application of *Young*, under which "the sole question for us becomes whether the relief sought by the [plaintiff] is prospective, not just in how it is captioned but also in its substance." 478 F.3d at 1259. The Tenth Circuit and others have read *Verizon Maryland* as limiting the analysis for the application of *Young* to the "straightforward inquiry," and either have not applied the *Coeur d'Alene* decision or have expressed uncertainty about its continuing viability as a vehicle for protecting state sovereignty interests.[12]

In contrast, in other circuits there continues to be a recognition that a consideration must be made in appropriate cases of the impact of the relief alleged on a state's sovereignty interests. One such application

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[12] *See, e.g.*, *Hill*, 478 F.3d at 1259 (holding *Verizon Maryland* abrogated consideration in *Young* analysis of sovereignty interests, and expressing uncertainty as to future application of *Coeur d'Alene*); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 496 (4th Cir. 2005) (following statement of *Young* test in *Verizon Maryland*); *Dakota, Minn. & E. R.R.*, 362 F.3d at 516-17 (noting *Verizon Maryland* unanimously reaffirmed the "traditional articulation" of the *Young* doctrine); *MCI Telecomms. Corp.* v. *BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1272 (11th Cir. 2002) (applying "straightforward inquiry"); *Pennsylvania Fed'n of Sportsmen's Clubs Inc.* v. *Hess*, 297 F.3d 310, 324 (3d Cir. 2002) (noting *Verizon Maryland* "made it quite clear that 'a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective"'"); *Ameritech Corp.* v. *McCann*, 297 F.3d 582, 586-87 (7th Cir. 2002) (applying "straightforward inquiry" and noting the "Supreme Court helped define precisely when the *Ex Parte Young* exception applies" in *Verizon Maryland*).

of this alternative approach is represented by the Second Circuit's decision in *Western Mohegan Tribe & Nation* v. *Orange County*, 395 F.3d 18 (2d Cir. 2004), in which an Indian tribe sought a judicial determination that its rights in a historical reservation had never been extinguished. 395 F.3d at 20. While noting that it had declined to extend the holding of *Coeur d'Alene* to other contexts, the Second Circuit found that case controlling and held that the tribe's claims were barred by the State of New York's sovereign immunity, and it further concluded that the case could not proceed under the *Young* exception against state officers. *Id.* at 23. Such an approach appears to recognize that the ultimate holding in *Coeur d'Alene* remains a viable part of the *Young* analysis.[13]

In the *Western Mohegan* decision, the Second Circuit acknowledged that it has "stated that in determining whether the *Ex parte Young* doctrine applies to avoid an Eleventh Amendment bar . . . 'a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* at 21 (quoting *CSX Transp., Inc.* v. *New York State Office of Real Prop. Servs.*, 306 F.3d 87, 98 (2d Cir. 2002), in turn quoting *Verizon*

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[13] *See, e.g.*, *Dubuc* v. *Michigan Bd. of Law Examiners*, 342 F.3d 610, 616-17 (6th Cir. 2003) (following rule of *Verizon Maryland* relating to a "straightforward inquiry," but also considering whether relief sought was the "functional equivalent of a quiet title action"); *Western Mohegan*, 395 F. 3d at 21-23 (acknowledging "straightforward" inquiry but applying test for "functional equivalent of a quiet title action").

Maryland, 535 U.S. at 645). Yet the Second Circuit also viewed *Coeur d'Alene* as continuing to provide a limitation on an application of *Young*. The circuit noted that *Coeur d'Alene* continues to be valid precedent, and the tribe's claims before it in *Western Mohegan* "raising the core issues of land, state regulatory authority, and sovereignty" involved relief that was "as much as that sought in *Coeur d'Alene*, the functional equivalent of [an action to] quiet the Tribe's claim to title in the New York counties named in the complaint." *Id.* at 23 (noting "[w]hile we express no opinion on the *limits* of *Coeur d'Alene's* applicability, we are bound to follow the case where, as here, it directly controls") (emphasis in original).

Thus, after *Verizon Maryland*, at least two analyses for the application of *Young* have emerged. One limits the *Young* analysis largely to a determination of whether the relief alleged is "prospective." Courts such as the Tenth Circuit have made clear that their understanding of this approach, the "straightforward inquiry," does not allow a consideration of state sovereignty interests. The other approach, however, continues to acknowledge the factual holding in *Coeur d'Alene*. Courts applying this analysis have indicated that under the latter challenges to state sovereignty will foreclose an application of *Young* if the factual circumstances are found be analogous to those in *Coeur d'Alene*.

II. CONFLICTING APPROACHES OF THE CIRCUITS TO THE APPLICATION OF *YOUNG* IN CASES SUCH AS THIS ARE YIELDING INCONSISTENT RESULTS ON AN IMPORTANT FEDERAL ISSUE

The conflict inherent in the different analyses of *Young* being applied in the courts of appeals is readily apparent in this case. The relief sought by the Osage Nation, on its face, involves claims which are indistinguishable in substance from those in the Second Circuit's decision in *Western Mohegan*. Yet the different courts of appeals reached opposite results. In two suits, both brought by Indian tribes against states and both involving closely similar relief, the *Young* doctrine was applied in one to confer federal jurisdiction but not in the other. In typical commercial litigation, such differing results might be explained away by the differences in applicable state law. But they cannot be justified in the application of a universal doctrine relating to an important constitutionally guaranteed immunity.

For purposes of a *Young* analysis, the relief sought by the Osage Nation and by the tribes in *Western Mohegan* and in *Coeur d'Alene* cannot be distinguished in any meaningful manner. In each case, an Indian tribe filed an action in federal court seeking to establish or re-establish its jurisdiction over lands that, in recent history, had been subject to the jurisdiction of the states. Unquestionably, there were some differences in the legal theories used in each

case.[14] But what is relevant here is that in all three cases, Indian tribes sought judicial determinations in federal court essentially rolling back long-exercised state sovereignty and jurisdiction in favor of tribal sovereignty and jurisdiction.[15]

As it was applied by the Tenth Circuit, the "straightforward" analysis of the applicability of *Young* did not take into account the sovereignty interests of

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[14] In *Coeur d'Alene*, the tribe asserted a right to a "beneficial interest, subject to the trusteeship of the United States, in the beds and banks of all navigable watercourses and waters . . . within the original boundaries" of its reservation in Idaho. *Coeur d'Alene*, 521 U.S. at 264-65. In the *Western Mohegan* case, the tribe sought a similar judicial declaration of its alleged rights, also subject to federal trusteeship, to lands within 10 counties in New York which it claimed had been improperly conveyed without federal approval sometime before 1790. *See Western Mohegan*, 395 F.3d at 20. The claim in *Western Mohegan* arose, in part, under the federal Nonintercourse Act, 25 U.S.C. § 177. In this case, the Tribe is seeking a judicial determination that its historical reservation in Oklahoma, largely subject to state jurisdiction since 1907, "exists as it did in 1871." (Pet. App. at 4a.)

[15] The concurring opinion in *Coeur d'Alene* emphasized this point in conclusion: "Where a plaintiff seeks to divest the State of all regulatory power over submerged lands—in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State." *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring). More recently, the concurring opinion in *Verizon Maryland* likewise underscored this point by observing that it was "unlike the case in *Coeur d'Alene*, where the plaintiffs tried to use *Ex parte Young* to divest a State of sovereignty over territory within its boundaries." *Verizon Maryland*, 535 U.S. at 648.

the state at issue in this case. In fact, the Tenth Circuit has expressly articulated an understanding of this analysis that eliminates any such consideration. *See Hill*, 478 F.3d at 1259 (noting that the "courts of appeals need not (and should not) linger over the question of whether 'special' or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought"). Under this analysis, federal jurisdiction was conferred, because the relief alleged—an injunction supposedly impacting only future tax collections—was characterized as "prospective" in nature.

On the other hand, in *Western Mohegan*, which applied the result in *Coeur d'Alene*, the suit seeking to challenge state jurisdiction was not permitted to proceed under the *Young* doctrine. This result was reached because the Second Circuit read *Coeur d'Alene* as "a case raising the core issues of land, state regulatory authority, and sovereignty" and because the relief sought "a declaration from the court that New York's exercise of fee title remains 'subject to' the Tribe's rights, *i.e.*, a 'determination that the lands in question are not even within the regulatory jurisdiction of the State.'" 395 F.3d at 23. That appeals court thus concluded that the relief sought was "as much as that sought in *Coeur d'Alene*, the functional equivalent of [a claim to] quiet the Tribe's claim to title in the New York counties named in the complaint." *Id.*

No circuit, of course, rejects the "straightforward inquiry" as the basic analysis for an application of *Young*. But what has emerged are at least two very different conceptions of the "straightforward inquiry."

One, that set forth by the Tenth Circuit in this case, purports to focus on a strict consideration of the prospective-retrospective distinction. That approach lacks any criteria for analyzing the exceptional case involving relief such as that sought in *Coeur d'Alene* and in this case. The result, then, is that the "straightforward inquiry" should result in the exercise of federal jurisdiction in every case in which the relief sought can be characterized as "prospective." The problem with this approach is that state sovereign immunity can be overcome by simple pleading.

The other approach continues to recognize that *Coeur d'Alene* has a continuing application to the exceptional case, if only on narrow factual grounds. That analysis, used by the Second Circuit, purports to determine whether the relief sought is "as much as that sought in *Coeur d'Alene*" the "functional equivalent" of a quiet title action. Such a test takes into account, if only indirectly, the sovereignty interests of a state that are at stake in a particular case. But its application is largely unguided, other than by a court's interpretation of the meaning of the "functional equivalent" of a quiet title action. That approach—when it is applied—is more protective of state sovereign immunity. But, as this case illustrates, when it will be applied depends on a court's largely subjective reading of *Coeur d'Alene*.

The elevated status of the states' sovereign immunity warrants a uniform application of the *Young* doctrine. Additionally, the cases in which sovereignty is at stake are important to the states, and involve matters the states should decide in the first instance. At risk in this case is the state's exercise of sovereignty

and jurisdiction over a significant portion of its land area, and all that such sovereignty and jurisdiction entail. These important cases should not depend on which circuit hears a case. No justification exists for the states' constitutionally guaranteed immunity to bar a suit in a New York federal court, but for the virtually identical suit to be permitted to proceed in an Oklahoma federal court. This type of uneven application of a judicially created exception to Eleventh Amendment immunity results in something very close to the case-by-case application of *Young* that this Court has avoided. *See, e.g.*, *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring) (rejecting case-by-case balancing approach to applying *Young*).

Suits such as this one involve invasive and far-reaching relief. As in *Coeur d'Alene*, the relief sought in this case "would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory" and it would "bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." *See Coeur d'Alene*, 521 U.S. at 282 (Kennedy J., opinion of the Court). The relief sought in this case would alter jurisdiction and sovereignty over a large land area that contains very little Indian land. What the Osage Nation is seeking is plainly much more intrusive on state sovereignty than was the tribe's claim in *Coeur d'Alene* to the right to control submerged lands. Such actions are suits *against the state*, regardless of which federal court hears them.

III. THE TENTH CIRCUIT'S ANALYSIS ALLOWS THE APPLICATION OF THE *YOUNG* DOCTRINE TO HISTORICAL CLAIMS THAT DO NOT INVOLVE EITHER ONGOING VIOLATIONS OF CLEAR FEDERAL LAW BY STATE OFFICERS OR "PROSPECTIVE" RELIEF

Aside from the lack of uniformity and consistency on an important federal question, the analysis adopted by the Tenth Circuit and other circuits is resulting in the application of *Young* to cases involving relief that is not truly "prospective" in nature. Under the prevailing formulation of the "straightforward" analysis for the application of *Young*, the prospective-retrospective distinction remains the primary and only real safeguard against the misapplication of the doctrine beyond its intended purpose and scope. Yet in this case the relief permitted under *Young* goes well beyond any reasonable conception of a forward-looking injunction to bring state officials back into compliance with federal law. It involves a long unasserted claim that can best be characterized as a claim to change the status quo based upon historical events.

As this case illustrates, there is a danger that the "straightforward inquiry" may be applied mechanically, and without an examination of the true nature of the relief being alleged, This Court's discussion in *Verizon Maryland* of a "straightforward" test for the application of *Young* did not expressly state that it was foreclosing the inclusion of relevant considerations concerning the relief sought in a particular case, nor did it impliedly do so. *See* 535

U.S. at 645. Nor did *Verizon Maryland* expressly overturn the *Coeur d'Alene* decision. As the Second Circuit correctly observed, *Coeur d'Alene*—despite its potential limits—remains valid precedent, and cannot simply be overlooked. *See Western Mohegan*, 395 F.3d at 23 (noting "we are bound to follow" *Coeur d'Alene* where "it directly controls").

Nor do this Court's decisions indicate that *Young* should be applied without a careful consideration of the actual nature of the relief alleged. The Court's Eleventh Amendment jurisprudence, in fact, indicates that the application of *Young* should have limits if the important nature of the states' immunity from suit is to be respected. It is recognized that Congress has narrow powers to abrogate the states' sovereign immunity, *see, e.g.*, *Alden*, 527 U.S. at 756, and, likewise, the federal courts' powers to confer federal jurisdiction over otherwise barred suits cannot be open-ended if such immunity is to be meaningful.

The ultimate result in *Coeur d'Alene* represented a recognition that some actions are not appropriate for an application of the *Young* doctrine, because they seek relief that truly is against a state (*e.g.*, its core sovereignty and jurisdictional interests) and are far from the types of suits that can fairly be characterized as necessary to ensure that state officials respect the supremacy of federal law. The case that falls within the core scope of *Young*—or the "run of the mill" *Young* suit, *Hill*, 478 F.3d at 1258—is a suit that seeks to bar further implementation of laws or regulations by a state officer in a manner alleged to be inconsistent with federal law.

This case represents something different. The only "ongoing" violation of federal law the tribe has alleged in this case—like that alleged by the tribes in *Coeur d'Alene* and in *Western Mohegan*—is, essentially, that a historical error or perhaps oversight resulted in the longstanding exercise of state jurisdiction. The result in *Coeur d'Alene* can be fairly read as a determination that the relief sought in that case was not the kind of "prospective" relief that is permissible under *Young*. In fact, historical claims, such as those asserted in *Coeur d'Alene* and in this case, seek to do much more than simply bring state officials back into compliance with clear mandates of federal law. They seek, rather, to alter or change the historical record, and it is a record upon which much state law and jurisdiction is based.

In certain instances, this Court has characterized as "prospective" injunctive and other relief allowed against state officials to remedy the *ongoing* consequences of past or historical violations of constitutionally protected rights. *See, e.g.*, *Papasan* v. *Allen*, 478 U.S. 265, 282-83 (1986); *Milliken* v. *Bradley*, 433 U.S. 267, 289-90 (1977). Yet the Osage Nation has alleged no violations of constitutional rights or any other well-defined federal rights. In cases such as this one the relief cannot be "prospective" in the accepted understanding of that term, because it seeks to remedy alleged violations that occurred sometime in the past. *See Republic of Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir. 1998).

A court in this case would be called upon to declare void the state's sovereignty over most of Osage County as of statehood more than a century ago. Although the

tribe is not seeking money damages for itself for past "violations" of its sovereignty, the impact of the tribe's claims certainly would have a monetary impact on the state, not only in the loss to its tax base but in the potential for monetary claims against the state.[16] This Court recognized in *Edelman* that "the difference between the type of relief barred by the Eleventh Amendment and that permitted by *Ex parte Young* will not in many instances be that between day and night." 415 U.S. at 667. This is a case in point. Upon a careful examination what the Osage Nation has pleaded as "prospective" injunctive relief plainly is backward-looking, both in its nature and in its ultimate effect on the state.

The further that plaintiffs stray from the core cases under *Young*, the less justified is the rationale that such suits are suits against the named officials, not the state itself. This is especially true when *Young* is misused as a vehicle for the pursuit of historical claims. Oklahoma's state tax officials are charged, by state law, solely with the responsibility for

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[16] A declaration that the Osage Reservation was never disestablished could give rise to individual income tax refund claims by tribal members who work for the Nation, but who live in Osage County on non-Indian lands, going back for three years worth of taxes paid. *See* Okla. Stat. Ann. tit. 68, § 2373 (West 2001) (noting three years as statute of limitations period on an income tax refund claim). This right to individual refunds arises under *state law*, and is within the sole control of the state, and can neither be relinquished by the Nation on behalf of its members nor limited by a judgment of a federal court. *See, e.g., Austin* v. *New Hampshire*, 420 U.S. 656, 661 (1975) (noting in area of taxation, state legislatures possess broad discretion).

administration of Oklahoma's tax laws, *see* Okla. Stat. Ann. tit. 68, § 102 (West 2001), and they have no special responsibilities to determine the overall sovereignty of the state. The Osage Nation's suit might as well have been brought against the governor of the state or the secretary of the environment or the state transportation director—all of whom carry out their legal mandates in Osage County as a matter of routine. An appropriate application of *Young* necessitates that the official being sued have some responsibility for the ongoing violation of law. *See Fitts* v. *McGhee*, 172 U.S. 516 (1899). The application of *Young* to historical claims necessarily gives rise to suits being filed against state officials for reasons other than because they are actually ignoring mandates of federal law.

Although the Court stopped short of expressly recognizing in *Coeur d'Alene* that claims involving deeply invasive relief with respect to state sovereignty are not "prospective" in nature, the ultimate holding does just that, at least in the case of tribal suits against states seeking to establish or re-establish tribal sovereignty and jurisdiction over state lands. The *Young* doctrine was not intended to serve as a vehicle for suits seeking merely to change existing or even longstanding interpretations of federal law, or for suits against officials who have no authority over or responsibility for the alleged historical "violation."

If the requirements for satisfying the *Young* doctrine can be met in this case, it is difficult to conceive of what appropriate boundaries remain on the application of this legal fiction. This case involves historical claims that could have been remedied

between the tribe and its federal trustee, through congressional action, or through individual taxpayer actions in state court at any time over the last century. It is not a typical or run-of-the-mill *Ex parte Young* action, and the relief sought is not "prospective." Additional guidance is needed from this Court to prevent the open-ended and inappropriate use of *Young* in cases such as this.

CONCLUSION

The Commissioners' petition for certiorari should be granted.

Respectfully submitted,

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May 27, 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 03-5162
(D.C. No. CV-01-516-P)

[Filed December 26, 2007]

OSAGE NATION,	)
	)
Plaintiff - Appellee,	)
	)
v.	)
	)
STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Vice-Chairman of the Oklahoma Tax Commission; DON KILPATRICK, Secretary-Member of the Oklahoma Tax Commission,	)
	)
Defendants - Appellants.	)
	)

ORDER AND JUDGMENT*

Before **O'BRIEN**, **EBEL**, Circuit Judges, and **STEWART**, District Judge.**

Notwithstanding the Eleventh Amendment, the district court permitted the Osage Nation ("the Nation" or "the Tribe") to sue the State of Oklahoma, the Oklahoma Tax Commission, and individual members of the Tax Commission in their official capacities in federal court to enjoin the State's assessment of income tax on tribal members who are employed by the Tribe and reside in Osage County, Oklahoma. Oklahoma's assessment of income tax would violate federal law only if all of Osage County is deemed to be "Indian country." Thus, the pivotal issue in this case is the areal extent of the Nation's land, not Oklahoma's taxing policy. The Nation seeks, in effect, to assert sovereign rights in direct opposition to the historically exercised sovereign authority of the State of Oklahoma. While this is not, by any means, a typical tax injunction suit, it nonetheless may proceed in federal court against the individual members of the

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* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** The Honorable Ted Stewart, United States District Judge for the District of Utah, sitting by designation.

Tax Commission under the *Ex parte Young* doctrine because it seeks relief that is prospective in nature.[1]

I. BACKGROUND

In 1871, the Nation purchased a 1.5 million acre reservation ("the Osage Indian Reservation" or "the Reservation") in what is now north-central Oklahoma, between the Arkansas River and the Kansas state line. On June 28, 1906, Congress enacted the Osage Allotment Act, which allotted the entire surface of the Reservation to members of the Tribe. *See* Act of June 28, 1906, ch. 3572, 34 Stat. 539. In 1907, Oklahoma became a state and the Reservation was incorporated into the State as Osage County. *See* Act of June 16, 1906, ch. 3335, 34 Stat. 267, § 21. Today, the Nation is still based in Osage County, which is the largest county in Oklahoma, covering some 2,250 square miles (approximately three percent of Oklahoma's total land area). Osage County has a population of over 44,000 people, mostly non-Indians.

The State of Oklahoma only recognizes trust land and allotments within Osage County as "Indian

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[1] We do not reach the question of whether the disputed land is within the jurisdiction of the Tribe or the State. Our review is limited to determining whether the federal forum is proper.

country" under 18 U.S.C. § 1151.[2] The Nation contends all of the land within Osage County is Indian country because the legal status of the Reservation has never been altered by Congress. According to the Nation, the Osage Indian Reservation exists today as it did in 1871. The State contends the Reservation lost its legal status when it was incorporated into the State at its statehood in 1907. Consistent with this understanding, the State has exercised jurisdiction over all of Osage County, with the exception of trust land, since that time. Specifically at issue in the Nation's suit is one aspect of the State's sovereignty – its assessment of income tax on tribal members who are employed by the Tribe on trust land and who reside within Osage County, but not on trust land.

As a general matter, a state cannot tax the income of a member of an Indian tribe who is employed by the tribe and lives within Indian country. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 165 (1973). A state can, however, tax the income of a tribal member who is employed by the tribe but resides outside Indian country. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463-67 (1995). Thus, whether Oklahoma's income tax is proper depends on whether all of the land within Osage County is Indian country or whether Indian country includes only that land

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[2] 18 U.S.C. § 1151 defines "Indian country" to mean "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished . . . ."

within Osage County held in trust for the Tribe by the United States.

In 1999, a tribal member who was employed by the Tribe on trust land and lived within the boundaries of the pre-statehood Reservation but not on trust land protested the State's assessment of income tax on her. The Oklahoma Tax Commission denied the requested relief, concluding that because the tribal member did not live in Indian country within the meaning of 18 U.S.C. § 1151, her income was taxable. The Commission explained "[t]he mere fact that one's residence is located within what was once part of an Indian tribe's original treaty lands, does not by such fact alone mean that one lives in 'Indian country'. . . ." (Appellants' App. at 27.)

Following the Commission's decision, the Nation filed the instant suit against the State of Oklahoma ex rel. Oklahoma Tax Commission,[3] seeking declaratory and injunctive relief. The Nation sought a declaratory judgment: "(1) that the Nation's reservation (comprising all of Osage County, Oklahoma) is and remains Indian country of the Nation; and (2) that the Nation's members who are employed by the Nation and reside within the geographical boundaries of the Nation's reservation are not . . . required to pay taxes

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[3] "A suit *ex rel.* is typically brought by the government upon the application of a private party (called a *relator*) who is interested in the matter." BLACK'S LAW DICTIONARY 603 (Bryan A. Garner, ed., 7th ed. 1999). Where, as here, the designation is used as to a defendant, we afford it no significance. Thus, we treat both Oklahoma and the Oklahoma Tax Commission as defendants.

to [the] State . . . on the income earned . . . from their tribal employment." (*Id.* at 11.) The Nation also sought a permanent injunction "restraining and prohibiting Defendant[s] . . . from levying or collecting Oklahoma state income taxes upon the income of the Nation's members who are employed by the Nation and reside within the geographical boundaries of the Nation's reservation." (*Id.*) The Nation asserted jurisdiction under 28 U.S.C. §§ 1331 and 1362.

The defendants filed a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing the Nation's suit was barred by the Eleventh Amendment.[4] The Nation then filed an amended complaint, adding the individual members of the Tax Commission as defendants. All of the defendants filed a motion to dismiss the amended complaint, raising the same arguments as in the original motion to dismiss. The court denied the defendants' motion, relying on our decision in *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 571-73 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001). The court explained "the Tenth Circuit [in *Sac & Fox*] reasoned that federal courts have jurisdiction under 28 U.S.C. § 1362 to consider the merits of [a] Kansas fuel tax

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[4] The defendants also claimed the Nation's suit was barred by the Tax Injunction Act, 28 U.S.C. § 1341, which provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." However, this Act does not bar suits brought by Indian tribes seeking to enjoin the enforcement of state tax law. *See Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 474-75 (1976).

[assessed against retail stores located on tribal land]. Consistent with the Tenth Circuit, this court asserts jurisdiction under § 1362 and finds . . . the Eleventh Amendment . . . [does not] bar this suit." (*Id.* at 60.) Under the collateral order doctrine, the defendants appeal from that portion of the court's order relating to the Eleventh Amendment. *Garramone v. Romo*, 94 F.3d 1446, 1452 (10th Cir. 1996) ("A district court's denial of Eleventh Amendment immunity . . . is immediately appealable as a final judgment under the collateral order doctrine.").

II. DISCUSSION

A. The Eleventh Amendment

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has interpreted this amendment to extend beyond its plain language to bar suits in federal court against a state by its own citizens, *Hans v. Louisiana*, 134 U.S. 1, 21 (1890), or by a foreign sovereign, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934). The Court has also interpreted the Eleventh Amendment to bar suits against a state by Indian tribes because tribes are analogous to foreign sovereigns. *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991).

The Supreme Court has recognized three exceptions to a state's sovereign immunity. *J.B. ex rel.*

Hart v. Valdez, 186 F.3d 1280, 1285-86 (10th Cir. 1999). First, a party may sue a state in federal court notwithstanding the Eleventh Amendment if the state consents to suit. *Id.* at 1286. Second, a party may sue a state if Congress has abrogated the state's sovereign immunity in a clear and unequivocal manner pursuant to a valid exercise of its power. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996).[5] Finally, under *Ex parte Young*, 209 U.S. 123 (1908), a party may sue individual state officers in federal court in their official capacity for prospective injunctive relief, so long as the suit does not fall within the narrow exception enunciated in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). *See Hill v. Kemp*, 478 F.3d 1236, 1255-56 (10th Cir. 2007). Instead of relying on one of these three exceptions, the district court relied on 28 U.S.C. § 1362 and *Sac & Fox*. The defendants contend this was error. "We review *de novo* a state's claim that a suit is barred by the Eleventh Amendment." *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1483 (10th Cir. 1995).

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[5] In *Seminole Tribe*, the Court held the Enforcement Clause (§ 5) of the Fourteenth Amendment is the only provision of the Constitution that empowers Congress to abrogate a state's immunity from suit. 517 U.S. at 59, 65, 72 n.15; *see also Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1195-96 (10th Cir. 1998). The Court subsequently held that Congress' power under the Enforcement Clause extends only to the enactment of "appropriate" corrective or preventative legislation to enforce the provisions of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507, 518-20 (1997) (holding Congress' enactment of the Religious Freedom Restoration Act of 1993 exceeded its enforcement power under § 5 of the Fourteenth Amendment).

B. 28 U.S.C. § 1362

Section 1362 provides that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." In *Blatchford*, the Supreme Court rejected the argument that § 1362 constitutes a Congressional abrogation of Eleventh Amendment immunity because it "does not reflect an unmistakably clear intent to abrogate immunity, made plain in the language of the statute." 501 U.S. at 786 (quotations omitted). The Court explained "[t]he fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct." *Id.* at 786 n.4. The district court erred to the extent it conflated the distinct concepts of subject matter jurisdiction and sovereign immunity.

In *Sac & Fox*, the case relied upon by the district court, we addressed whether the Eleventh Amendment barred suit in federal court by three Indian tribes to enjoin the State of Kansas from collecting tax on motor fuel distributed to retail gas stations located on Indian lands within the State.[6] 213 F.3d at 569. The district court had granted a permanent injunction prohibiting the State from collecting the tax. On appeal, the State contended the district court lacked jurisdiction because the tribes' suit was barred by the doctrine of sovereign

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[6] Notably, the State of Kansas was not named as a defendant in *Sac & Fox*. The only defendant was Karla Pierce, Secretary of the Kansas Department of Revenue.

immunity and the tribes lacked standing. We "reject[ed] the State's jurisdictional contentions, and conclude[d] the district court properly exercised jurisdiction over this cause." *Id.* at 571.

In reaching this result, we looked closely at *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976). In *Moe*, the Supreme Court read 28 U.S.C. § 1362 to imply that a tribe's access to federal court to litigate federal question cases would be, at least in some respects (*e.g.*, for the purpose of obtaining injunctive relief from state taxation), as broad as that of the United States suing as the tribe's trustee. 425 U.S. at 472-73. However, as the Court made clear in *Blatchford*, "*Moe* did not purport to be saying that § 1362 equated tribal access [to federal courts] with the United States' access *generally*, but only 'at least in some respects' or 'in certain respects.'" 501 U.S. at 784 (citations omitted).[7] In *Sac & Fox*, we followed *Moe* and concluded the tribes' suit to enjoin enforcement of the Kansas motor fuel tax was one of those "certain respects." 213 F.3d at

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[7] In *Blatchford*, the Supreme Court stated that *Moe* involved only a question of jurisdiction, not of sovereign immunity: "[In *Moe*,] [s]ince Montana had not objected in this Court on sovereign immunity grounds, its immunity had been waived and was not at issue." *Blatchford* at 785 n.3; *see also Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1049 n.8 (9th Cir. 2000) ("[N]or do we believe that *Moe* addressed the Eleventh Amendment issue."). Thus, *Moe* may stand only for the limited proposition that, where a state has waived its sovereign immunity, the Tax Injunction Act does not bar a tribe's suit against the state in federal court because jurisdiction is conferred under § 1362.

572-73.[8] We explained "*Moe* leads us to conclude that we have jurisdiction under 28 U.S.C. § 1362 to reach the merits of this case. Surely if an Indian tribe may maintain suit on its own behalf in federal court to enjoin collection of a state's cigarette sales tax, it may maintain a similar suit on its own behalf to enjoin collection of a state's motor fuel distribution tax." *Id.* at 572.

Sac & Fox does not speak to the real issue in this case, which is not whether the State's income tax is proper. While the Nation claims to be seeking only injunctive relief from state taxation, the essence of this case is whether the Nation or the State of Oklahoma is the supreme sovereign with respect to Osage County or whether some form of dual sovereignty may apply.

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[8] Our holding in *Sac & Fox* must not be read too broadly or taken out of context -- certainly there was no intent to ignore other unmistakably clear language from *Blatchford*:

> Respondents now urge . . . a vast expansion upon *Moe*. Section 1341, which *Moe* held § 1362 to eliminate in its application to tribal suits, was merely a limitation that Congress itself had created -- committing state tax-injunction suits to state courts as a matter of comity. Absent that statute, state taxes could constitutionally be enjoined. The obstacle to suit in the present case, by contrast, is a creation not of Congress but of the Constitution [Eleventh Amendment immunity]. A willingness to eliminate the former in no way bespeaks a willingness to eliminate the latter, especially when limitation to "certain respects" has explicitly been announced.

501 U.S. at 784-85 (citation omitted).

The Nation contends all of the land within Osage County is part of the Osage Indian Reservation and thus, Indian country. If the Nation is correct, the State cannot collect income tax from any tribal members employed by the Tribe living in Osage County.[9] The State contends the non-trust land in Osage County is not Indian country and instead is under the jurisdiction of the State. If the State is correct, the income tax is proper. Whether the non-trust portions of Osage County are Indian country is a question of jurisdiction, not of tax, and the relief the Nation seeks is to divest Oklahoma of sovereign rights, not simply to enjoin a tax.[10] Because this suit is not a mere tax injunction suit, *Sac & Fox* is not controlling. Rather, we must look to the principle announced in *Blatchford* – that 28 U.S.C. § 1362 does not override the State's Eleventh Amendment immunity. The Nation's suit can only proceed in federal court if it falls within one

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[9] A ruling in favor of the Nation on the merits could affect more than the State's ability to collect income tax. The Nation might be able to foreclose Oklahoma from exercising sovereignty over Osage County in myriad other ways.

[10] In its amended complaint, the Nation alleges: "Defendants' assertions and actions . . . infringe upon the Nation's sovreignty [sic] and rights to self-government and self-determination, and impose adverse and unlawful burdens on the Nation and its members." (Appellants' App. at 22.) In its brief, the Nation states it "seeks a judicial acknowledgment of a position the Nation has been asserting for years and that the State has refused to recognize – that the legal status of the Osage Reservation remains in existence as the Indian country of the Nation, within the meaning of 18 U.S.C. § 1151(a)." (Appellee's Br. at 3).

of the three recognized exceptions to sovereign immunity.

The first two exceptions are easily disposed of as neither party contends the State waived its sovereign immunity or that Congress has abrogated sovereign immunity in this context. Thus, the district court erred in concluding the Nation's suit could proceed against the State and the Tax Commission in federal court. But that does not end the matter as to the individual defendants sued in their official capacities as we must consider whether the suit can proceed against them under the *Ex parte Young* exception to Eleventh Amendment immunity.[11]

C. *Ex parte Young*

"In *Ex parte Young*, the Court held that the Eleventh Amendment generally will not operate to bar suits so long as they (i) seek only declaratory and injunctive relief rather than monetary damages for alleged violations of federal law, and (ii) are aimed against state officers acting in their official capacities, rather than against the State itself." *Hill*, 478 F.3d at

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[11] The Nation contends we should not consider whether the *Ex parte Young* exception applies because the defendants did not make this argument in the district court. Though the Eleventh Amendment is not jurisdictional in the traditional sense, it does have jurisdictional elements and thus we could consider this argument even if were raised for the first time on appeal. *See Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1231 (10th Cir. 1999). We note both parties have briefed the issue, although the Nation did so reluctantly.

1255-56.[12] The *Young* doctrine is premised on the fiction that a suit against state officers seeking only prospective injunctive relief is not an action against the state and is therefore not subject to the sovereign immunity bar. *Id.* at 1256. The doctrine strikes a delicate balance by ensuring on the one hand that states enjoy the sovereign immunity preserved for them by the Eleventh Amendment while, on the other hand, "giving recognition to the need to prevent violations of federal law." *Coeur d'Alene*, 521 U.S. at 269.

In *Coeur d'Alene*, the Court held the Eleventh Amendment barred suit by an Indian tribe against state officials, where the suit sought a declaration of the tribe's entitlement to the exclusive use, occupancy, and right to quiet enjoyment of submerged lands claimed by the State of Idaho. *Id.* at 265, 282 (Kennedy, J.).[13] The Court justified its rejection of

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[12] Although the Nation added the individual Tax Commissioners as defendants in its amended complaint, it retained the State of Oklahoma and its Tax Commission. In theory, we could remand this case for dismissal of the State and the Tax Commission as the *Young* doctrine only applies if the suit is asserted against state officers in their official capacity. For purposes of judicial efficiency, we will consider whether this suit could proceed under *Ex parte Young*, assuming the State and the Tax Commission were dismissed.

[13] While Justice Kennedy wrote the majority opinion in *Coeur d'Alene*, he commanded a majority only with respect to certain sections. *See Hill*, 478 F.3d at 1257 (discussing the "multiple and fractured opinions" involved in *Coeur d'Alene*). We cite only to sections that commanded a majority.

Young on the basis that the tribe's suit was equivalent to a quiet title action and the relief sought would erase the state's regulatory authority over the disputed land. *Id.* at 282. The Court indicated its concerns were magnified because the land in question was submerged and states have historically had especially strong sovereign interests in navigable waters and the lands underlying them. *See id.* at 283-84. The Court explained:

> [T]he declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe. This is especially troubling when coupled with the far-reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action. The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

Id. at 282. Justice O'Connor wrote a separate concurrence, questioning the "principal opinion['s] . . . central conclusion: that a case-by-case balancing approach is appropriate where a plaintiff invokes the *Young* exception to the Eleventh Amendment's jurisdictional bar, even when a complaint alleges a violation of federal law and clearly seeks prospective relief." *Id.* at 293-94 (O'Connor, J., concurring). As we described in *Hill*, Justice O'Connor's concurrence "seemed to suggest that we must assess whether a claim seeks relief effectively equivalent to a retrospective judgment regardless of how it is formally pled or denominated." 478 F.3d at 1258.

In *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, decided five years after *Coeur d'Alene*, the Court made clear it was Justice O'Connor's approach in *Coeur d'Alene* that controlled. 535 U.S. 635, 645 (2002). The Court held "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* (quotations and internal alterations omitted).[14]

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[14] Justice Kennedy concurred in the judgment in *Verizon Maryland* for purposes of distinguishing *Coeur d'Alene*. He explained: "[*Verizon Maryland*] is unlike [*Coeur d'Alene*], where the plaintiffs tried to use *Ex parte Young* to divest a State of sovereignty over territory within its boundaries. In such a case, a 'straightforward inquiry,' which the Court endorses here . . . proves more complex . . . . In my view, our *Ex parte Young* jurisprudence requires careful consideration of the sovereign

It is not clear what is left of *Coeur d'Alene* following *Verizon Maryland*. In *Western Mohegan Tribe and Nation v. Orange County*, decided post-*Verizon Maryland*, the Second Circuit applied the *Coeur d'Alene* exception to the *Young* doctrine to bar a tribe's suit against the State of New York and its Governor, claiming the state was wrongly in possession of land in ten New York counties that belonged to the tribe. 395 F.3d 18, 19 (2d Cir. 2004). The lands at issue included state parks, state wildlife management areas, state-managed lakes and wetlands, state historic sites, and the Empire State Plaza, where the state capitol is located. The court stated: "While, in other contexts, we have declined to extend *Coeur d'Alene*'s holding we have not had occasion to consider a case raising the core issues of land, state regulatory authority, and sovereignty expressly examined by the *Coeur d'Alene* Court." *Id.* at 23 (citations omitted). The court concluded the tribe's suit did not fall within the *Young* exception because the relief sought by the tribe was analogous to the relief sought in *Coeur d'Alene*: "To the extent that the complaint alleges that there has never been a lawful extinguishment of the Tribe's Indian title, it seeks a declaration from this court that New York's exercise of fee title remains 'subject to' the Tribe's rights . . . thus, the relief requested by the Tribe is, as much as that sought in *Coeur d'Alene*, the functional equivalent of quiet the Tribe's claim to title

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interests of the State as well as the obligations of state officials to respect the supremacy of federal law." 535 U.S. at 648-49 (Kennedy, J., concurring). His was a voice in the wilderness. Justice O'Connor took no part in the consideration or decision of *Verizon Maryland*. *Id.* at 648.

in the New York counties named in the complaint." *Id.* (citation omitted).

This case is different from *W. Mohegan* as it does not involve an actual title dispute. Sovereignty is the issue here, not ownership of land. Our case law instructs us not to consider state sovereignty in determining whether the *Young* doctrine is applicable:

> [T]he courts of appeals need not (and should not) linger over the question whether "special" or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought .... Instead, the Supreme Court ... instructed [in *Verizon Maryland*] that we are to proceed immediately in every case to the "straightforward [or so one might hope] inquiry" whether the relief requested is "properly" characterized as prospective or is indeed the functional equivalent of impermissible retrospective relief .... [T]he sole question for us becomes whether the relief sought by [the plaintiff] is prospective, not just in how it is captioned but also in its substance.

Hill, 478 F.3d at 1259. We are certainly sympathetic to the State's argument and we reject the Nation's characterization of this suit as "nothing more than a mere tax case." (Appellee's Br. at 28.) Unlike *Hill*, this suit "calls to mind the sort of literal land grab effort made by the plaintiffs in *Coeur d'Alene*," *id.* at 1260, even though it does not involve an actual title dispute. Nonetheless, we are compelled to follow *Hill*. We may consider only whether the relief sought by the Nation is prospective in caption and substance, and we

conclude it is. The relief sought may have far-reaching implications on Oklahoma's sovereignty, but it nonetheless falls within the *Young* exception to Eleventh Amendment immunity and the suit can proceed against the individual members of the Tax Commission in federal court.

We **REVERSE** the district court's decision to allow the Nation's suit to proceed against the State of Oklahoma and the Oklahoma Tax Commission and remand for dismissal of those defendants. As to the individual defendants, the decision of the district court is **AFFIRMED** for the stated reasons herein.

ENTERED FOR THE COURT

Terrence L. O'Brien
Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 01-CV-516-P(M)

[Filed August 27, 2003]

OSAGE NATION,	)
	)
Plaintiff,	)
	)
v.	)
	)
STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Vice-Chairman of the Oklahoma Tax Commission; DON KILPATRICK, Secretary-Member of the Oklahoma Tax Commission,	)
	)
Defendants.	)

ORDER

Now before the court is the Defendants' Motion to Dismiss Amended Complaint, Plaintiff's Response to said motion, and Defendants' Reply. Defendants move

this court to dismiss Plaintiff's case pursuant to Fed.R.Civ.P. 12(b)(1). Specifically, Defendants contend the statutes relied upon by Plaintiff for its invocation of this court's jurisdiction fail to abrogate the Oklahoma Tax Commission's ("OTC") Eleventh Amendment sovereign immunity from suit, and that Plaintiff's claims are barred by the terms of the Tax Injunction Act, 28 U.S.C. §1341.

Plaintiff's Amended Complaint seeks (1) a declaratory judgment holding all of Osage County, Oklahoma to be its formal reservation and therefore Indian Country, (2) a declaratory judgment holding that all its members employed by it and living in the geographical boundaries of that County are exempt from Oklahoma income taxes on their tribal wages and (3) a permanent injunction against OTC and its officers, employees and agents from levying or collecting those income taxes from such persons. Plaintiff asserts this court has jurisdiction pursuant to 28 U.S.C. §1331, federal question jurisdiction, and 28 U.S.C. § 1362, which grants district courts original jurisdiction over civil actions brought by federally-recognized Indian tribes wherein the matter in controversy arises under the Constitution, laws or treaties of the United States.

Defendants contend 28 U.S.C. § 1331 and 28 U.S.C. §1362 cannot provide a basis for this court's jurisdiction because neither section reflects the requisite Congressional intent to abrogate Oklahoma's immunity. Defendant also argues that in light of the Supreme Court's decision in *Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)*, Congress is without

power to vest this court with jurisdiction, pursuant to these sections.

The Tenth Circuit, however, has ruled that Indian tribes, asserting jurisdiction under 28 U.S.C. §1362, may seek injunctive relief from state taxation in federal court. *See Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566, 571-73 (10th Cir. 2000) cert. denied Pierce v. Sac and Fox Nation of Missouri, ___ U.S. ___, 121 S.Ct. 1078, 148 L.Ed.2d 955 (2001); Sac and Fox Nation of Missouri v. Pierce, ___ U.S. ___, 121 S.Ct. 1078, 148 L.Ed.2d 955 (2001); see also Prairie Band Potawatomie Nation v. Richards, 241 F.Supp.2d 1295 (D.Kan. 2003); Sac and Fox Nation of Missouri, 979 F.Supp. 1350, 1352-53 (D.Kan. 1997).*

In *Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566 (10th Cir. 2000)*, the Tenth Circuit contemplated, under a set of facts very similar to those in the instant case, whether Indian tribes could maintain suits in federal court to enjoin collection of the State of Kansas's motor fuel tax. Relying on the Supreme Court's decision in *Moe v. Confederated Salish and Keetanai Tribes, 425 U.S. 463 (1976)*, the court determined that neither the Eleventh Amendment nor the Tax Injunction Act, 28 U.S.C. §1341, barred the tribes suit. The court reached this conclusion notwithstanding the Supreme Court's decision in *Seminole Tribe of Florida, 517 U.S. 44 (1996)*, finding that the Seminole Tribe Court had expressly recognized that in *Moe* it had reached a different conclusion due to the fact that the case involved an Indian tribe's access to federal court for the purpose of obtaining injunctive relief from taxation. Based on the *Moe* decision, the Tenth Circuit

reasoned that federal courts have jurisdiction under 28 U.S.C. §1362 to consider the merits of the Kansas fuel tax case. Consistent with the Tenth Circuit, this court asserts jurisdiction under §1362 and finds neither the Eleventh Amendment, nor the Tax Injunction Act bar this suit.

Therefore, Defendants' Motion to Dismiss is denied.

IT IS SO ORDERED this 27th day of August, 2003.

/s/
JAMES H. PAYNE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 03-5162

[Filed February 26, 2008]

OSAGE NATION,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, et al.,	)
	)
Defendants-Appellants.	)

ORDER

Before **O'BRIEN**, **EBEL**, Circuit Judges, and **STEWART**, District Judge.*

Appellants' petition for rehearing is denied.

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* The Honorable Ted Stewart, United States District Judge for the District of Utah, sitting by designation.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. The petition for rehearing en banc is denied. Judges Briscoe, Murphy, O'Brien, and Tymkovich voted to rehear the case en banc.

Entered for the Court,

/s/
ELISABETH A. SHUMAKER, Clerk

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(2)

No. 07-1484

FILED
JUL 30 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

THOMAS E. KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Vice-Chairman of the Oklahoma Tax Commission; and CONSTANCE IRBY, Secretary-Member of the Oklahoma Tax Commission,

Petitioners,

v.

OSAGE NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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July 30, 2008

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QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the Tenth Circuit correctly held that the proper standard for determining whether the Eleventh Amendment is a bar to Respondent's action is found in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), requiring that a court "need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective?"

2. Using the *Verizon Maryland* standard, whether the U.S. Court of Appeals for the Tenth Circuit correctly held that the relief sought by Respondent "is prospective in caption and substance" and, thus, not barred by the Eleventh Amendment?

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Respondent, Osage Nation (the "Nation"), a federally-recognized Indian tribe, respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari submitted by Petitioners, the Oklahoma Tax Commissioners, ("Petitioners" or "Commissioners"), to review the order and judgment of the United States Court of Appeals for the Tenth Circuit. The Nation submits that the Court should deny the Petition since there is no compelling reason to review the Tenth Circuit's ruling that the Nation's suit may proceed under the *Ex parte Young*[1] exception.

STATEMENT OF THE CASE

In 2001, the Osage Nation instituted this action in federal court seeking declaratory relief under the Declaratory Judgment Act[2] that its reservation is and remains Indian country and, from that declaration, an order enjoining Petitioners from collecting income taxes from the Nation's members who both reside and earn that income from sources within Indian country. The Nation's action was not brought on behalf of any particular tribal member; rather, the claim is based on well-established federal law recognizing that a state cannot levy and collect taxes against a tribe or tribal members in Indian country absent

[1] 209 U.S. 123 (1908).

[2] 28 U.S.C. § 2201.

congressional authorization.[3] At no time in this litigation has the Nation suggested that its request for relief should apply *retroactively* to allow for an award of tax refunds to tribal members[4] or to take away lawful authority from Petitioners or the State of Oklahoma itself. Rather, all suggestions of what *might* happen should the Nation be successful on the merits are theoretical scenarios, created by Petitioners, and not based on the actual relief being sought by the Nation. Moreover, Petitioners frame their Questions Presented solely around the Nation's request for declaratory relief as to the Indian country status of the Nation's reservation, but, to be accurate, the injunctive relief against future unlawful taxation is the true basis for the Nation's claim under *Ex parte Young*.

The court of appeals held that the Eleventh Amendment was not a bar to the Nation's suit against the Commissioners. Relying on this Court's holding in *Verizon Maryland*, the court of appeals conducted "a straightforward inquiry into whether

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[3] *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973).

[4] Contrary to the State's assertion in its "Questions Presented," the Nation's request for injunctive relief does not concern the findings of any state tax officials in administrative tax refund cases. Rather, the Nation seeks to enjoin the state tax officials from *prospectively* levying and collecting tax from the income of tribal members who both earn that income and reside in the Nation's Indian country. Simply put, the Nation's request for relief does not pertain to any administrative tax refund procedures.

the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective" (Pet. App. at 16a) or whether the relief sought was the "functional equivalent of impermissible retrospective relief." (Pet. App. at 18a). The court of appeals concluded the Nation's relief was prospective *both* in caption and substance and that the suit against the Commissioners was not barred by the Eleventh Amendment.

In reaching its holding, the court of appeals also considered this Court's *Coeur d'Alene*[5] decision but determined that *Coeur d'Alene* was distinguishable from the instant case based on the relief being sought by the Nation. Petitioners request that this Court clarify what remains of *Coeur d'Alene* after *Verizon Maryland* when (as Petitioners articulate it) the suit challenges core state sovereignty interests. However, review by this Court is not necessary since *Verizon Maryland* made it clear what the appropriate inquiry should be when considering whether a suit may proceed under *Ex parte Young*. To the extent a court should also consider *Coeur d'Alene* in the analysis, the court of appeals did in fact make a determination that even *Coeur d'Alene* was not a bar to the Nation's action. Finally, not only is the relief sought by the Nation clearly distinguishable from the relief sought in *Coeur d'Alene*, the impact to any state sovereignty interests is minimal. This case does not present a

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[5] *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

compelling reason for this Court to grant the petition for a writ of certiorari.

Factual Background

By the Act of June 5, 1872, ch. 310, 17 Stat. 228, Congress established for the Nation a reservation of lands within the (former) Indian Territory in Oklahoma. The Act, titled "An Act to confirm to the Great and Little Osage Indians a Reservation in the Indian Territory," provides in pertinent part:

> That in order to provide said Osage tribe of Indians with a reservation, and secure to them a sufficient quantity of land suitable for cultivation, the following described tract of country, west of the established ninety-sixth meridian, in the Indian Territory, be, and the same is hereby, set apart for and confirmed as their reservation, namely: Bounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the main channel of the Arkansas river, and on the north by the south line of the State of Kansas. . . .

Since the Nation's reservation was established in 1872, the Nation has occupied and maintained a continuous presence in its reservation with its governmental headquarters currently located in Pawhuska, Oklahoma. On June 28, 1906, 34 Stat. 539, Congress enacted the Osage Allotment Act that, with the exception of several acres reserved for governmental purposes, allowed for the Osage Reservation to be allotted in its entirety to tribal members. As a

result, no surplus lands were to be required opened for non-Indian settlement. Nothing in the Osage Allotment Act, in its operative language, or otherwise, "restores" the lands of the Nation to the "public domain." The Osage Allotment Act clearly provides for the lands of the Osage Reservation to be divided as equally as was practicable among the Osage tribal members, rather than to the public domain. *See* 34 Stat. 539, 540. Contrary to Petitioners' suggestion, a reservation that had its lands allotted does *not* necessarily mean the reservation boundaries have been disestablished or terminated. Rather, this Court has developed an analytical structure to determine whether Congress has evidenced its intent to alter the legal status of an Indian reservation. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962).

Likewise, the Commissioners' argument that Oklahoma's entry into the Union disestablished the Osage Reservation boundaries is without merit. The Oklahoma Enabling Act, an act of Congress admitting Oklahoma into the Union in 1906, specifically preserved federal authority over Indians, Indian lands, property, and other rights by treaties or other agreements. *See* Oklahoma Enabling Act, ch. 3335, § 1, 34 Stat. 267, 267-68 (1906). In fact, four years after Oklahoma's statehood, a federal appellate court expressly rejected the proposition that Oklahoma's entry into the Union dissolved all Indian country

within the (former) Indian Territory. *United States Express Co. v. Friedman*, 191 F. 673, 679-80 (8th Cir. 1911) ("[T]he states are equal in power, and a new state, when admitted, is clothed with all the powers of the original states [citations omitted]; but the power of Congress over Indian relations is plenary and has no relation to state lines. . . .").[6]

Moreover, there are other sections within the Oklahoma Enabling Act that reference the continual existence of the Osage Reservation after statehood. Section 2 of the Oklahoma Enabling Act provides in pertinent part:

> [A]nd all persons qualified to vote for said delegates shall be eligible to serve as delegates; and the delegates to form such convention shall be one hundred and twelve in number, fifty-five of whom shall be elected

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[6] The U.S. Court of Appeals for the Tenth Circuit in *Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) specifically referenced the effect of the Oklahoma Enabling Act to Indian interests in the newly formed State and noted:

> The language of the Oklahoma [Enabling Act], read in its historical context, suggests that Congress intended to preserve its jurisdiction and authority over Indians and their lands in the new State of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians, and dissolving completely the tribally-owned land base – events that never occurred and goals that Congress later expressly repudiated.

Indian Country, U.S.A., 829 F.2d at 979-80.

> by the people of Indian Territory, and two shall be elected by the electors ***residing in the Osage Indian Reservation*** in the Territory of Oklahoma; and the governor, the chief justice, and the secretary of the Territory of Oklahoma shall apportion the Territory of Oklahoma into fifty-six districts, as nearly equal in population as may be, except that such apportionment shall include as ***one district the Osage Indian Reservation***, and the governor, the chief justice, and the secretary of the Territory of Oklahoma shall appoint an election commissioner who shall establish ***voting precincts in said Osage Indian Reservation***, and shall appoint the judges for election in ***said Osage Indian Reservation***; and two delegates shall be elected from said Osage district . . . [t]hat ***in said Indian Territory and Osage Indian Reservation***, nominations for delegate to said constitutional convention may be made by convention. . . .

(emphasis added).

Section 3 of the Enabling Act provides:

> Second. That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as ***the Indian Territory and the Osage Indian Reservation*** and within any

> other parts of said State which existed as Indian reservations. . . .[7]

(emphasis added).

> Section 21 of the Enabling Act provides:
>
> That the constitutional convention may by ordinance provide for the election of officers for a full State government, including members of the legislature and five Representatives to Congress, and shall ***constitute the Osage Indian Reservation*** a separate county, and provide that it shall remain a separate county until ***the lands in the Osage Indian Reservation*** are allotted in severalty and until changed by the legislature of Oklahoma, and designate the county seat thereof. . . .

34 Stat. 267, 268-69, 277 (emphasis added). The direction under § 21 of the Enabling Act was carried out in Art. XVII, sec. 8 of the Constitution of the State of Oklahoma which provides that ***"[t]he Osage***

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[7] Notably, the language in the Oklahoma Enabling Act references the Osage Indian Reservation as a whole without distinguishing between any allotted parcels of land within the reservation. Also, section 3 of the Enabling Act clearly references the Osage Indian Reservation in its *present* tense form ("now known as . . . the Osage Indian Reservation. . . .") while making reference to other Indian reservations in Oklahoma in a *past* tense form ("other parts of said State which existed as Indian reservations. . . ."). Clearly, Congress did not intend for the Enabling Act to be the basis for terminating the Osage Reservation upon Oklahoma's entry into the Union.

Indian Reservation with its present boundaries is hereby constituted one county to be known as Osage County . . . Pawhuska is hereby designated the County Seat of Osage County." To date, the Oklahoma Constitution still has this language.

Since the Osage Allotment Act of 1906, the entire subsurface mineral estate of the Osage Reservation ("Osage Minerals Estate") has been held in trust for the Osage Nation with mineral royalties belonging to Osage headright owners under a system established by federal law. The federal government is the trustee for the Osage Minerals Estate. In 2004, Congress enacted "An Act to reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government." P.L. 108-431, 118 Stat. 2609. Through this Act, the Nation developed and adopted its own constitution that provided for its own form of government and reaffirmed the extent of its governmental authority over its territory. Prior to this, the Nation's governmental powers and authority over its affairs in its reservation were defined by acts of Congress. The 2004 Act did nothing to lessen any federal superintendence over the Osage Reservation, but, rather, the Act simply reaffirmed the sovereign authority of the Nation to exercise powers of self-government on its own instead of through acts of Congress.

The instant suit was brought by the Nation for the purpose of enjoining the Commissioners from

continuing to levy and collect taxes from the income of the Nation's members who both earn that income and reside within the boundaries of the Nation's reservation, based on well-established federal law. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991); *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). The Petitioners' explanation for its continued taxation against tribal members in the Nation's reservation (except for trust or restricted land) is that the State has been asserting its authority and sovereignty over the reservation since statehood. Whether this explanation is wholly accurate or not is beside the point since Petitioners fail to understand that only Congress has plenary authority over Indian affairs and that the State has no authority to unilaterally alter the legal status of an existing Indian reservation simply by asserting its jurisdiction there. *See, e.g., Indian Country, U.S.A.*, 829 F.2d at 974 (finding that a tribe's past failure to challenge Oklahoma's jurisdiction over reservation lands does not negate congressional intent to treat those lands as Indian lands under exclusive federal supervision).

The Nation instituted this action in federal court seeking declaratory relief under the Declaratory Judgment Act that its reservation is and remains Indian country and, from that declaration, an order enjoining Petitioners from collecting income taxes

from the Nation's members who both reside and earn that income from sources within Indian country.

REASONS TO NOT GRANT THE WRIT OF CERTIORARI

The decision of the court of appeals is correct. The court of appeals carefully considered and applied this Court's precedent pertaining to Eleventh Amendment challenges by a state and correctly determined that this suit may proceed in federal court. Petitioners attempt to manufacture a conflict in the circuits as to the law that should be applied when, in actuality, the circuits are applying the same law, but are simply reaching different results based on the facts. There exists no compelling reason for certiorari to be granted in this case.

1. Petitioners' principle reason for requesting that certiorari be granted in this case is that the Tenth Circuit supposedly did not take "state sovereignty and jurisdiction" into foremost consideration when conducting its analysis under *Ex parte Young*. Petitioners principally rely on *Coeur d'Alene* and claim that the Tenth Circuit did not apply it correctly in this case, and, notwithstanding how the Tenth Circuit applied it, there exists a conflict in the circuits as to how *Coeur d'Alene* should be applied. Both of these propositions are incorrect.

In conducting its analysis, the court of appeals was mindful of this Court's decision in *Coeur d'Alene* and, subsequently, *Verizon Maryland*. Contrary to Petitioners' position, the court of appeals did recognize the continued existence of *Coeur d'Alene* in its Eleventh Amendment analysis:

> [U]nder *Ex parte Young*, 209 U.S. 123 (1908), a party may sue individual state officers in federal court in their official capacity for prospective injunctive relief, so long as the suit does not fall within the narrow exception enunciated in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

(Pet. App. at 8a). Petitioners suggest that the court of appeals on its own decided to find *Coeur d'Alene* no longer controlling when considering Eleventh Amendment disputes. However, the court of appeals did in fact recognize *Coeur d'Alene* as a "narrow exception" to the *Ex parte Young* doctrine, and properly incorporated the *Coeur d'Alene* analysis into the framework established by this Court in *Verizon Maryland*.

Prior to this Court's decision in *Verizon Maryland*, the Tenth Circuit had applied *Coeur d'Alene* in a prior case, *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998), and, based on this Court's direction in *Coeur d'Alene*, the Tenth Circuit at that time concluded:

> We read *Coeur d'Alene Tribe* as imposing an important new requirement on federal courts as part of the *Ex parte Young* analysis.

> In light of *Coeur d'Alene Tribe*, federal courts must examine whether the relief being sought against a state official "implicates special sovereignty interests." If so, we must ***then*** determine whether the requested relief is the "functional equivalent" to a form of legal relief against the state that would otherwise be barred by the *Eleventh Amendment*.

(emphasis added). *Id.* at 1190. In other words, the Tenth Circuit read *Coeur d'Alene* as requiring a federal court to, first, consider the relief being sought to determine if it "implicates special sovereignty interests" and, second, refer to the requested relief as pled to determine if, given the special sovereignty interests that are implicated, whether the requested relief amounts to relief that is barred by the Eleventh Amendment.

After the Tenth Circuit's ruling in *ANR Pipeline*, this Court issued its decision in *Verizon Maryland* that clarified the proper framework for an Eleventh Amendment analysis, to-wit:

> In determining whether the doctrine of *Ex parte Young* avoids an *Eleventh Amendment* bar to suit, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." (citing *Coeur d'Alene*, 521 U.S. at 296).

Verizon Maryland, 535 U.S. at 645. In disagreeing with the Fourth Circuit's approach that disputed

whether the basis for the claim was ultimately inconsistent with federal law, this Court held that "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Id.* at 646 (citing *Coeur d'Alene*, 521 U.S. at 281).

Thus, it is apparent that this Court's framework under *Verizon Maryland* still includes the considerations that existed in *Coeur d'Alene* but only to the extent of determining, as in any *Ex parte Young* analysis, whether the relief is properly characterized as prospective in both caption and substance. This Court did not expressly overrule *Coeur d'Alene* in *Verizon Maryland*. As such, it becomes apparent that consideration of any "special sovereignty interests" remains part of the analysis, but only to determine whether the requested relief is the "functional equivalent" to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment. Although Petitioners would like a federal court to give more emphasis to any "special sovereignty interests" *prior* to conducting an inquiry into whether the complaint seeks prospective relief against an ongoing violation of federal law, such analysis is not the standard, per *Verizon Maryland*.

In its decision, the court of appeals correctly followed the approach outlined in *Verizon Maryland*. Citing to its decision in *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007), issued after *Verizon Maryland*, the Tenth Circuit noted:

> [T]he Supreme Court in *Verizon Maryland* clarified that the courts of appeals need not (and should not) linger over the question whether "special" or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought. Thus, to the extent that our decision in *ANR Pipeline* read *Coeur d'Alene* as requiring "federal courts [to] examine whether the relief sought against a state official 'implicates special sovereignty interests,'" [cite omitted], we recognize today that *Verizon Maryland* abrogated this step.
>
> . . .
>
> Following the Supreme Court's most recent and definitive guidance in *Verizon Maryland*, the sole question for us becomes whether the relief sought by [Plaintiff] is prospective, not just in how it is captioned but also in its substance.

Id. at 1259. Here, the caption of the Nation's complaint seeks *prospective* injunctive relief that Petitioners be enjoined from continuing to levy and collect taxes from the income of tribal members within the Nation's Indian country.

As to the substance of the Nation's request for relief, the Tenth Circuit determined that the suit was not barred since it was not the "functional equivalent" of a relief that would otherwise be barred by the Eleventh Amendment. Contrary to Petitioners' view, the "special sovereignty interests" that existed in *Coeur d'Alene* were not ignored in the analysis.

Rather, as *Verizon Maryland* teaches us, consideration of any "special sovereignty interests" is conducted as part of – but not in place of – the "straightforward inquiry" to determine if the complaint seeks relief properly characterized as prospective. Admittedly, there are instances where the substance of a complaint, regardless of how it is captioned, amounts to a form of relief that would otherwise be barred by the Eleventh Amendment. However, as explained further below, the "special sovereignty interests" raised by Petitioners are not equivalent to those raised in *Coeur d'Alene* and, as the Tenth Circuit determined, do not amount to a form of relief that would otherwise be barred by the Eleventh Amendment.

The most common form of relief that would amount to an impermissible suit under the Eleventh Amendment is one that results in consequent significant implications on state funds. *See, e.g., Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (Federal courts may not award retrospective relief, for instance, money damages or its equivalent, if the State invokes its immunity); *Green v. Mansour*, 474 U.S. 64, 69 (1985) (the Eleventh Amendment barred the injunction ordering retroactive benefits because it was effectively an award of money damages for past violations of federal law). In fact, one of the concerns raised in *Coeur d'Alene* was the likely impact to Idaho's treasury should the tribe have prevailed. *Coeur d'Alene*, 521 U.S. at 287 ("if the Tribe were to prevail, Idaho's sovereign interest in its lands and

waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury.").

Notably, the Tenth Circuit in the *Hill* case, in its application of this Court's holding in *Verizon Maryland*, referred to the significant impact on the state's treasury that would likely arise in cases, like *Coeur d'Alene*, where a plaintiff sought to transfer ownership or possession of real property from the state. *Hill*, 478 F.3d at 1260. In footnote twenty-eight, the court in *Hill* stated:

> Lower courts that have found *Coeur d'Alene* applicable have involved just such circumstances. *See, e.g., Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18 (2nd Cir. 2004) (claiming that the State of New York was wrongfully in possession of 10 counties); *Ysleta Del Sur Pueblo v. Raney*, 199 F.3d 281 (5th Cir. 2000) (seeking to eject state officers from piece of real property); *MacDonald v. Vill. of Northport, Mich.*, 164 F.3d 964 (6th Cir. 1999) (seeking declaration that right-of-way that provided access to navigable waterway was the lawful property of plaintiffs).

Id. Thus, cases like *Coeur d'Alene* that seek a transfer of ownership or possession of land from the state, arguably, are cases that could have retroactive implications to the state's treasury and are cases that might otherwise be barred by the Eleventh Amendment. Such cases are the "functional equivalent [to]

impermissible retrospective relief" and are cases that cannot be maintained under *Ex parte Young*. However, as explained further herein, the Nation's suit does not seek a transfer of ownership or possession of land from the State or anyone and does not request relief in any manner that would have retroactive implications to the State's treasury. The Nation's suit clearly falls under *Ex parte Young*, both in caption and substance, and does not seek relief that would otherwise be barred by the Eleventh Amendment.

2. The cases cited by Petitioners do not establish that a conflict exists in the circuits. Petitioners cite to the Second Circuit case of *Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18 (2nd Cir. 2004), and the Sixth Circuit case of *Dubuc v. Michigan Bd. of Law Examiners*, 342 F.3d 610 (6th Cir. 2003), as those cases relied heavily on *Coeur d'Alene* while the Tenth Circuit in the instant case did not. However, upon careful review, nowhere in the Tenth Circuit's analysis did the court foreclose the application of *Coeur d'Alene* in the process. As previously stated, under this Court's *Verizon Maryland* analytical framework, a court must still determine that the relief sought – regardless of how it is captioned – is properly characterized as prospective. The Tenth Circuit in the instant case acknowledged that *Coeur d'Alene* did not allow a suit to proceed under *Ex parte Young* since "the tribe's suit was equivalent to a quiet title action and the relief sought would erase the state's regulatory authority over the dispute land." (Pet. App. at 15a). It thus is apparent that a

case involving a form of relief that is equivalent to a quiet title action with facts similar to *Coeur d'Alene* amounts to "the functional equivalent of impermissible retrospective relief" and, thus, barred by the Eleventh Amendment.

The cases of *Western Mohegan* and *Dubuc* are not inconsistent with this approach. In *Western Mohegan*, the Second Circuit referred to the "straightforward inquiry" requirement outlined in *Verizon Maryland* but nevertheless determined that the tribe's request for relief was "virtually identical" to the relief sought in *Coeur d'Alene*:

> To the extent that the complaint alleges that there has never been a lawful extinguishment of the Tribe's Indian title, it seeks a declaration from this court that New York's exercise of fee title remains 'subject to' the Tribe's rights . . . [t]hus, the relief requested by the Tribe is, as much as that sought in *Coeur d'Alene*, the functional equivalent of quiet the Tribe's claim to title in the New York counties named in the complaint.

Western Mohegan, 395 F.3d at 23.

Likewise, in *Dubuc*, the Sixth Circuit acknowledged the "straightforward inquiry" requirement under *Verizon Maryland* but found that the relief sought was not the "functional equivalent of a quiet title action that implicates a state's sovereign interest in its lands or waters." *Dubuc*, 342 F.3d at 617.

In *Western Mohegan* and in *Dubuc*, both circuit courts concluded that the "straightforward inquiry" under *Verizon Maryland* was the applicable standard and recognized that relief that was the "functional equivalent to a quiet title action" as in *Coeur d'Alene* remained a part of the analysis. This is not inconsistent with the Tenth Circuit's approach in the instant case; however, as explained below, the Nation's request for relief does not pertain to a dispute over land title and does not approach the level of impact to state sovereignty as existed in *Coeur d'Alene*. Petitioners are simply trying to carve out a conflict among the circuits when there is none.

Concluding that the Nation seeks relief that is prospective both in caption and substance, the Tenth Circuit properly allowed the Nation's suit to proceed under *Ex parte Young*. In doing so, the court correctly followed this Court's guiding principle outlined in *Verizon Maryland*. The Tenth Circuit's decision is thus in line with this Court's case law and, as such, there is no compelling reason for this Court to grant certiorari in this matter.

3. Assuming, arguendo, that *Coeur d'Alene* still requires a federal court to give foremost consideration to a state's "special sovereignty interests" similar in nature and substance to the interests raised in that case, the facts in the instant case are clearly distinguishable and do not rise to the level touching on significant sovereignty interests that existed in *Coeur d'Alene*. In *Coeur d'Alene*, the Coeur d'Alene Tribe of Idaho brought suit in federal court naming the State

of Idaho, various state agencies, and numerous state officials, claiming ownership in submerged lands and bed of Lake Coeur d'Alene and of the various navigable rivers and streams that form part of the lake's water system. *Coeur d'Alene*, 521 U.S. at 264-65. The Tribe also sought a declaratory judgment that would establish its entitlement to the *exclusive* use and occupancy and the right to quiet enjoyment of the submerged lands as well as declaration to invalidate the application of *all* state law as to the submerged lands. *Id.* at 265. Finally, the Tribe sought injunctive relief to prohibit the defendants from taking any action in violation of the Tribe's rights of exclusive use and occupancy, all consistent with its quiet enjoyment and other ownership interest in the submerged lands. *Id.*

This Court determined that while the Coeur d'Alene Tribe could not initiate a direct quiet title action against Idaho in federal court without the State's consent, the relief sought by the Tribe was "close to the functional equivalent of quiet title in that *substantially all benefits of ownership and control would shift from the State to the Tribe.*" *Id.* at 281-82 (emphasis added). Also, this Court noted that the injunctive relief sought against the named State officials would prevent those officials from exercising

their governmental powers and authority over the disputed land and waters.[8] *Id.* at 282.

The Nation's suit is markedly different from the suit brought in *Coeur d'Alene*. The most significant difference is that the Nation is *not* seeking to alter any form of ownership or control of land from the State of Oklahoma (or from any property owner) to the Nation. The Nation is *not* seeking any beneficial property interest in any land, whether submerged or not. The Nation is *not* seeking to eliminate the application of all state law to land within the Osage Reservation. Indeed, the Nation's request for injunctive relief is limited to a specific remedy (enjoin unlawful tax collection against tribal members) against specific defendants (Oklahoma Tax Commissioners).[9]

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[8] Notably, in *Coeur d'Alene*, this Court spent considerable effort detailing the significance of submerged lands and navigable waters to state sovereignty interests. The Nation's suit does not involve any transfer of ownership or control over any submerged lands or navigable waters within the Osage Reservation and, thus, any state sovereignty interests in submerged lands or waters are not being challenged here.

[9] Also, unlike in *Coeur d'Alene*, the Nation does allege that the Commissioners are acting beyond the authority conferred upon them by their own state regulations. *See* Oklahoma Administrative Code 710:50-15-2 (applying income tax exemption for tribal members who both reside and earn income from sources within, among other places, "formal and informal reservations" [citing 18 U.S.C. § 1151]). Thus, the Nation's suit is similar to *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) where the state officials were found to be acting beyond the authority conferred upon them by the State.

It is clear from Petitioners' "Questions Presented" and the brief in support that the crux of Petitioners' reliance on *Coeur d'Alene* and the implication of the state's "special sovereignty interests" pertain to the Nation's request for a declaratory judgment that its reservation is and remains Indian country. However, the primary problem with the way Petitioners style the issue is that, in its suit, the Nation is *not* seeking to establish sovereignty and jurisdiction over a "historical" reservation that would divest the State of substantial jurisdiction and authority. The Petitioners are attempting to frame the issue in this case in line with the issue that existed in *Coeur d'Alene* when, in fact, they are not the same.

In *Coeur d'Alene*, the issue clearly involved an adjudication of ownership to submerged lands and bed of Lake Coeur d'Alene that would result in a transfer of title from the State to the Tribe.[10] From the transfer of ownership rights to the Tribe would flow the right to prohibit the application of State law and control over the lands and would clearly divest the State of authority and jurisdiction (unless other provided under federal law) over individuals and activity on those lands. This is similar to the request for relief sought by the tribal plaintiffs in the *Western*

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[10] It is noteworthy that the Coeur d'Alene Tribe eventually obtained beneficial ownership in the disputed lands when the United States successfully sued the State of Idaho on behalf of the Tribe to quiet title. *Idaho v. United States, et al.*, 533 U.S. 262 (2001).

Mohegan case cited by Petitioners. Unlike *Coeur d'Alene* and *Western Mohegan*, in this suit, the Nation is not seeking relief that would affect any ownership rights in real property; instead, the Nation seeks judicial acknowledgement of the boundaries of its Indian country under federal law.

A determination that land is Indian country is a matter of federal law and does not require a change in title or possession to real property.[11] When considering whether certain land is Indian country, this Court has determined that the appropriate inquiry starts with whether such land falls within one of the categories outlined in 18 U.S.C. § 1151. "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *Sac and Fox*, 508 U.S. at 123 (citing Section 1151); *see also Chickasaw Nation*, 515 U.S. at 453 ("'Indian country,' as Congress comprehends that term, see 18 U.S.C. § 1151, includes 'formal and informal reservations' . . . "). The Nation asserts that its Indian country consists of its

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[11] Since only Congress can disestablish reservation boundaries, any question regarding the continued status of reservation boundaries is a matter of federal law and an issue appropriate for adjudication in federal court. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962).

reservation lands, and, pursuant to § 1151(a), that includes *all* land within the reservation boundaries, not just restricted lands or lands held in trust within those boundaries. This does not, however, require that *any* land within the Nation's reservation change ownership or possession from the current owners (whether held as private property or State or county property) to the Nation.

Also, any significant alteration to applicable law in the reservation will be governed by the scope and limits of tribal jurisdiction in Indian country as determined by the Nation's own laws and as provided under federal law. This includes the limits set out by this Court for tribal jurisdiction over non-Indians in Indian country. *See, e.g., Plains Commerce v. Long Family*, 128 S.Ct. 2709 (2008) (holding that Tribe has no jurisdiction to adjudicate discrimination claim concerning non-Indian selling fee land to another non-Indian on a reservation); *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645 (2001) (holding that, with very limited exceptions, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian fee land within a reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal courts have no authority to adjudicate claims against nonmembers arising out of accidents on state highways running through a reservation); *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989) (Because Congress did not expressly delegate to the Yakima Nation the power to zone fee lands of nonmembers, the Yakima Nation does not have this

authority); *Montana v. United States*, 450 U.S. 544 (1981) (establishing standard for which a tribe may regulate activities of nonmembers or the conduct of non-Indians on fee lands within a reservation).

Contrary to Petitioners' suggestion, a determination that the Nation's reservation retains its Indian country status does not, in and of itself, divest the State of any lawful jurisdiction that it may otherwise assert in Indian country. Unlike the impact from a change in ownership or possession of land, complete authority by the State over land that is declared to be within Indian country – especially fee land owned by non-Indians – will not necessarily transfer to the Nation. The relief the Nation seeks is nowhere near the functional equivalent to a quiet title action and, thus, the impact to any sovereignty interests of the State does not rise to the level as seen in *Coeur d'Alene*.

Further, given the teaching of *Verizon Maryland*, it is proper to only consider the relief being sought by the Nation under a "straightforward inquiry" without considering the merits of the claim. Here, the Nation's request for relief pertains only to an injunction against unlawful state taxation in Indian country, and, as such, Petitioners' attempt to have the court consider implications that might arise based on the merits of the claim is not appropriate under *Verizon Maryland*. Any attempt to look beyond the pleading and substance of the Nation's suit is largely academic

at this point. The court of appeals conducted the proper standard in this case, and so there exists no compelling reason for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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